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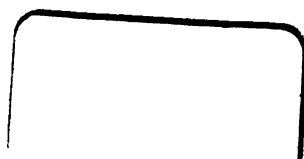
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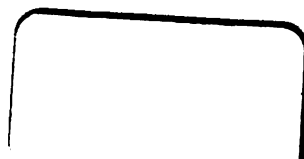
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SELECT CASES
AND
OTHER AUTHORITIES
ON THE
LAW OF PROPERTY.

SELECT CASES
AND
OTHER AUTHORITIES
ON THE
LAW OF PROPERTY.

BY
JOHN CHIPMAN GRAY,
ROYALL PROFESSOR OF LAW IN HARVARD UNIVERSITY.

VOLUME III.

SECOND EDITION.

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PREFACE TO THE SECOND EDITION
OF THE
THIRD AND FOURTH VOLUMES.

THE experience of the seventeen years since the publication of the first two volumes has convinced me that they contain more cases than can be satisfactorily treated in a single course of lectures. It has also confirmed my opinion that a collection of cases should not attempt to cover too much ground, but that the cases should be multiplied on the crucial topics. A single case on a subject has little advantage over a text-book. It is only by presenting a doctrine in many aspects that the best results can be reached.

I have tried to bear both these points in mind in the present edition, in which about two hundred pages have been stricken out, and one hundred added, in each of the two volumes.

To my friend and colleague, Professor Edward H. Warren, I am indebted for collecting the recent authorities; for valuable suggestions as to arrangement; and for seeing the two volumes through the press.

J. C. G.

MAY, 1906.

PREFACE.

THIS Collection of Cases is prepared for the convenience of students in the Law School of Harvard University.

The head-notes are always, and the arguments generally, omitted.

As one of the main objects in the study of cases is to acquire skill and confidence in extracting the *ratio decidendi*, the omission of head-notes from a collection like this is an essential part of the scheme. To thrust before the eyes of a student of law the answer to the problem contained in a case is like telling a student in arithmetic the answer to his sum before he does it, with the additional disadvantage that the answer in the head-note is often wrong.

On the other hand, the omission of the arguments is an evil, but a necessary one. To have retained them would either have compelled the exclusion of many valuable cases, or else have swollen the size and expense of volumes already larger and more costly than I could wish.

With the exception of the head-notes and arguments, and of a few passages the omission of which is duly noted, the cases are reprinted literally from the reports; but I have striven after some consistency in the use of capitals and italics, and where a citation was obviously wrong, I have corrected it.

The book is intended for study, not for practice. That one who has carefully read these cases will find the volumes of considerable aid in after professional life, I have no doubt; but by one who has not thus become acquainted with their contents, the want of head-notes will probably be felt an invincible obstacle to their use.

Further, the reading of these cases, it should be remembered, is intended to be accompanied by oral instruction, and therefore they are without the comments which would, on so difficult a subject, be desirable, if the cases were meant for solitary study.

As any one will find who attempts to compile a collection of cases, it is hard to make it small enough. I have tried to limit myself to the leading and illustrative authorities, and in the few notes no attempt has been made at a full collection of the decisions, — indeed, no case is ever referred to without a distinct reason for calling attention to it.

A special difficulty in dealing with the law of property, and particularly of real property, is to determine how much to dwell on parts of the law which have now become practically obsolete. No two persons would probably decide this question in exactly the same way. I have endeavored to bear in mind, on the one hand, that a real knowledge of the law as it is, requires a knowledge of the law as it has been; and, on the other, that I am working for men who are preparing themselves to be lawyers, and not merely for students of the history of institutions.

For the parts of the law of which he treats and for which it was impossible or undesirable to give cases, I have had recourse to the terse and exact sentences of Littleton.

I desire especially to acknowledge the aid I have received from Mr. Leake's Digest of the Law of Land. This excellent book (unfortunately not finished) has met with less appreciation than it deserves.

J. C. G.

AUGUST, 1888.

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BOOK VI.
ACQUISITION OF REAL ESTATE INTER VIVOS.

CHAPTER I.
ORIGINAL ACQUISITION

GIFFORD *v.* YARBOROUGH.

HOUSE OF LORDS. 1828.

[Reported 5 Bing. 168.]

BEST, C. J.¹ My Lords, the question which your Lordships have proposed for the opinion of the Judges is as follows: "A. is seised in his demesne as of fee of the manor of N., and of the demesne lands thereof, which said demesne lands were formerly bounded on one side by the sea. A certain piece of land, consisting of about 450 acres, by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and matter slowly, gradually, and imperceptibly, and by imperceptible increase in long time cast up, deposited, and settled by and from flux and reflux of the tide, and waves of the sea in, upon, and against the outside and extremity of the said demesne lands hath been formed, and hath settled, grown, and accrued upon, and against, and unto the said demesne lands. Does such piece of land so formed, settled, grown, and accrued as aforesaid, belong to the Crown or to A., the owner of the said demesne lands? There is no local custom on the subject."

¹ In this report in Bingham, only the opinions of the Judges and of the Law Lords are given. *Sub nom. The King v. Yarborough*, the case is fully reported in the King's Bench, 8 B. & C. 91; and in the House of Lords, 2 Bligh, N. S. 147.

The Judges have desired me to say to your Lordships that land gradually and imperceptibly added to the demesne lands of a manor, as stated in the introduction to your Lordships' question, does not belong to the Crown, but to the owner of the demesne land.

All the writers on the law of England agree in this: that as the king is lord of the sea that flows around our coasts, and also owner of all the land to which no individual has acquired a right by occupation and improvement, the soil that was once covered by the sea belongs to him.

But this right of the sovereign might, in particular places, or, under circumstances, in all places near the sea, be transferred to certain of his subjects by law. A law giving such rights may be presumed from either a local or general custom, such custom being reasonable, and proved to have existed from time immemorial. Such as claim under the former must plead it and establish their pleas by proof of the existence of such a custom from time immemorial.

General customs were in ancient times stated in the pleadings of those who claimed under them; as the custom of merchants, the customs of the realm with reference to innkeepers and carriers, and others of the same description. But it has not been usual for a long time to allude to such customs in the pleadings, because no proof is required of their existence; they are considered as adopted into the common law, and as such are recognized by the Judges without any evidence. These are called "customs" because they only apply to particular descriptions of persons, and do not affect all the subjects of the realm; but if they govern all persons belonging to the classes to which they relate, they are to be considered as public laws; as an Act of Parliament applicable to all merchants, or to the whole body of the clergy, is to be regarded by the Judges as a public Act.

If there is a custom regulating the right of the owners of all lands bordering on the sea, it is so general a custom as need not be set out in the pleadings, or proved by evidence, but will be taken notice of by the Judges as part of the common law. We think there is a custom by which land from which the sea is gradually and imperceptibly removed by the alluvion of soil, becomes the property of the person to whose land it is attached, although it has been the *fundus maris*, and as such the property of the king. Such a custom is reasonable as regards the rights of the king, and the subjects claiming under it; beneficial to the public; and its existence is established by satisfactory legal evidence.

There is a great difference between land formed by alluvion, and derelict land. Land formed by alluvion must become useful soil by degrees too slow to be perceived: little of what is deposited by one tide will be so permanent as not to be removed by the next. An embankment of a sufficient consistency and height to keep out the sea must be formed imperceptibly. But the sea frequently retires suddenly, and leaves a large space of land uncovered.

When the authorities relative to these subjects are considered, this difference will be found to make a material distinction in the law that applies to derelict lands, and to such as are formed by alluvion. Unless trodden by cattle, many years must pass away before lands formed by alluvion would be hard enough or sufficiently wide to be used beneficially by any one but the owner of the lands adjoining. As soon as alluvion lands rise above the water, the cattle from the adjoining lands will give them consistency by treading on them; and prepare them for grass or agriculture by the manure which they will drop on them. When they are but a yard wide the owner of the adjoining lands may render them productive. Thus lands which are of no use to the king will be useful to the owner of the adjoining lands, and he will acquire a title to them on the same principle that all titles to lands have been acquired by individuals, viz. by occupation and improvement.

Locke in a passage in his Treatise on Government, in which he describes the grounds of the exclusive right of property, says: "God and man's reason commanded him to subdue the earth; that is, improve it for the benefit of life, and therein lay out something upon it that was his own, his labor. He that in obedience to that command subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property which another had no title to, nor could without injury take from him."

This passage proves the reasonableness of the custom that assigns lands gained by alluvion to the owner of the lands adjoining.

The reasonableness is further proved by this, that the land so gained is a compensation for the expense of embankment, and for losses which frequently happen from inundation to the owners of lands near the sea.

This custom is beneficial to the public. Much land which would remain for years, perhaps forever, barren, is in consequence of this custom rendered productive as soon as it is formed. Although the sea is gradually and imperceptibly forced back, the land formed by alluvion will become of a size proper for cultivation and use; but in the mean time the owner of the adjoining lands will have acquired a title to it by improving it.

The original deposit constitutes not a tenth part of its value; the other nine tenths are created by the labor of the person who has occupied it; and, in the words of Locke, the fruits of his labor cannot, without injury, be taken from him.

The existence of this custom is established by legal evidence. In Bracton, book 2, cap. 2, there is this passage: "*Item, quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio latens incrementum; et per alluvionem adjeci dicitur quod ita paulatim adjicitur quod intelligere non possis quo momento temporis adjiciatur. Si autem non sit latens incrementum, contrarium erit.*"

In a treatise which is published as the work of Lord Hale, treating

of this passage, it is said: "that Bracton follows in this the civil law writers; and yet even according to this the common law doth regularly hold between parties. But it is doubtful in case of an arm of the sea." Hale de Jure Maris, p. 28. It is true that Bracton follows the civil law, for the passage above quoted is to be found in the same words in the Institute, lib. 2, tit. 1, § 20. But Bracton, by inserting this passage in his book on the laws and customs of England, presents it to us as part of those laws and customs. Lord Hale admits that it is the law of England in cases between subject and subject; and it would be difficult to find a reason why the same question between the Crown and a subject should not be decided by the same rule. Bracton wrote on the law of England, and the situation which he filled, namely, that of Chief Justice in the reign of Henry the Third, gives great authority to his writings. Lord Hale, in his History of the Common Law (cap. 7), says, that it was much improved in the time of Bracton. This improvement was made by incorporating much of the civil law with the common law.

We know that many of the maxims of the common law are borrowed from the civil law, and are still quoted in the language of the civil law. Notwithstanding the clamor raised by our ancestors for the restoration of the laws of Edward the Confessor, I believe that these and all the Norman customs which followed would not have been sufficient to form a system of law sufficient for the state of society in the times of Henry the Third. Both courts of justice and law writers were obliged to adopt such of the rules of the Digest as were not inconsistent with our principles of jurisprudence. Wherever Bracton got his law from, Lord Chief Baron Parker, in Fortescue, 408, says, "As to the authority of Bracton, to be sure many things are now altered, but there is no color to say it was not law at that time. There are many things that have never been altered, and are now law." The laws must change with the state of things to which they relate; but, according to Chief Baron Parker, the rules to be found in Bracton are good now in all cases to which those rules are applicable. But the authority of Bracton has been confirmed by modern writers and by all the decided cases that are to be found in the books. The same doctrine that Bracton lays down is to be found in 2 Rolle's Abr. 170; in Com. Dig., tit. Prerogative (D. 61); in Callis (Broderip's edition), p. 51; and in 2 Bl. Com. 261.

In the *Case of the Abbot of Peterborough*, Hale de Jure Maris, p. 29, it was holden: "Quod, secundum consuetudinem patriæ, domini maneriorum prope mare adjacentium, habebunt marettum et sabulonem per fluxus et refluxus maris per temporis incrementum ad terras suas costeræ maris adjacentes projecta." In the treatise of Lord Hale it is said, "Here is custom laid, and he relies not barely on the case without it." But it is a general, and not a local custom, applicable to all lands near the sea, and not to lands within any particular district. The pleadings do not state the lands to be within any district, and such

a statement would have been necessary if the custom pleaded were local. The *consuetudo patriæ* means the custom of all parts of the country to which it can be applied; that is, in the present case, all such parts as adjoin the sea.

The case of *The King v. Oldsworth*, Hale de Jure Maris, p. 14, confirms that of the *Abbot of Peterborough* as to the right of the owner of the adjoining lands to such lands as were "secundum majus et minus prope tenementa sua projecta" (p. 29). That case was decided against the owner, because he also claimed derelict lands against the Crown.

Here it will be observed that there is a distinction made between lands derelict and lands formed by alluvion; which distinction, I think, is founded on the principle that I have ventured to lay down, namely, that alluvion must be gradual and imperceptible; but the dereliction of land by the sea is frequently sudden, leaving at once large tracts of its bottom uncovered, dry, and fit for the ordinary purposes for which land is used. But still what was decided in this case is directly applicable to the question proposed to us. The Judges are, therefore, warranted by justice, by public policy, by the opinions of learned writers, and the authority of decided cases, in giving to your Lordships' question the answer which they have directed me to give.

My Lords, the answer to your Lordships' question is the unanimous opinion of all the Judges who heard the arguments at your Lordships' bar. For the reasons given in support of that opinion I alone am responsible. Most of my learned brothers were obliged to leave town for their respective circuits before I could write what I have now read to your Lordships. I should have spared your Lordships some trouble if I had had time to compress my thoughts; but I am now in the midst of a very heavy Nisi Prius sittings, and am obliged to take from the hours necessary for repose the time that I have employed in preparing this opinion. If it wants that clearness of expression which is proper for an opinion to be delivered by a Judge to this House, I hope that your Lordships will consider what I have stated as a sufficient apology for this defect.

THE LORD CHANCELLOR. My Lords, I beg to express my thanks to the learned Chief Justice, and to the Judges, for the attention they have paid to this subject; and I have only to add that I entirely concur in the conclusion at which they have arrived; and I would recommend to your Lordships, as a necessary consequence of the opinion which has been expressed, that the judgment of the Court of King's Bench upon the matter should be affirmed.

EARL OF ELDON. My Lords, I heard only part of the argument, and therefore I have some difficulty in stating my opinion in this case; but having had my attention called to subjects of the same nature on former occasions, it does appear to me, I confess, after reading the finding of the jury, that the opinion of the Judges must be that which

the learned Chief Justice has now expressed. I therefore concur in the opinion the Lord Chief Justice has expressed.

*Judgment affirmed.*¹

¹ In *Steers v. City of Brooklyn*, 101 N. Y. 51 (1885), EARL, J., said, p. 56: "When soil is by natural causes gradually deposited in the water opposite upland, and thus the water-line is carried further out into the ocean or other public water, it becomes attached to the upland, and the title of the upland owner is still extended to the water-line, and the accretion thus becomes his property. Natural injustice requires that such accretion should belong to the upland owner so that he will not be shut off from the water, and thus converted into an inland rather than a littoral owner."

In *Attorney-General v. Chambers*, 4 De G. & J. 55, 67-69 (1859), LORD CHELMSFORD said: "There is nothing, however, in any of the cases, or in the few text writers upon the subject, which hints at the distinction now sought by the Crown to be established between effects produced by natural and by artificial causes. In order to determine whether there is any ground for this distinction, it is essential to discover, if possible, the principle upon which the right to *maritima incrementa* depends.

"The law is stated very succinctly by Blackstone, vol. 2, p. 262, in these words: 'As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma*, or by dereliction, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and besides these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss; but if the alluvion or dereliction be sudden and considerable, in this case it belongs to the King, for as the King is lord of the sea, and as owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry.'

"I am not quite satisfied that the principle *de minimis non curat lex* is the correct explanation of the rule on this subject; because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron Alderson, in the case of *The Hull and Selby Railway Company*, 5 M. & W. 327, viz., 'That which cannot be perceived in its progress is taken to be as if it never had existed at all.' And as Lord Abinger said in the same case, 'The principle as to gradual accretion' is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.' It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the sea-shore. If this be the true ground of the rule, it seems difficult to understand why similar effects, produced by a party's lawful use of his own land, should be subject to a different law, and still more so if these effects are the result of operations upon neighboring lands of another proprietor. Whatever may be the nature and character of these operations, they ought not to affect a rule which applies to a result and not to the manner of its production.

"Of course an exception must always be made of cases where the operations upon the party's own land are not only calculated, but can be shown to have been intended, to produce this gradual acquisition of the sea-shore, however difficult such proof of intention may be."

And it was held in *Lovington v. St. Clair County*, 64 Ill. 56 (1872), affirmed 23 Wall. 46 (U. S., 1874), that title to land, made gradually by alluvion, passed to the riparian owner, although the accretion was aided by artificial structures on the land of other persons. *Tatum v. St. Louis*, 125 Mo. 647 (1894), accord.

note

FOSTER v. WRIGHT.

COMMON PLEAS DIVISION. 1878.

[Reported 4 C. P. D. 438.]

MOTION for judgment.¹

Action to try the right of fishing in part of the River Lune.

The claim alleged that the plaintiff was the owner of the Camp House Farm, abutting on the river, and of the whole bed of the river abutting on the farm; that he also claimed in the alternative a several fishery, and likewise in the alternative a free fishery in that part of the river; that he also claimed the bed of the river and the said rights of fishing as lord of the honor and manor of Hornby, which comprised the river and the bed thereof; and that the defendant had committed divers trespasses by entering upon the bed of the river and fishing therein, and preventing the plaintiff from fishing therein.

The defence alleged (*inter alia*) that the defendant and those whose estate he had, were the owners of the Snabhouse estate, abutting on the river, and that the grievances complained of consisted of acts of fishery and other acts done by the defendant in that part of the river lying between its shore on the Snabhouse estate (opposite the Camp House Farm), and the middle of the bed of the river along the same part of the Snabhouse estate; the defendant denied that the plaintiff was owner or possessed of that part of the bed of the river. Issue.

At the trial before *Brett*, L.J., at the Lancashire Spring Assizes, 1878, it appeared that no facts were substantially disputed except as to a question of boundary, viz., the extent to which the River Lune had encroached upon the land of the defendant. Some encroachment was admitted, and the parties arranged that the question of boundary should thereafter be settled between them, and that the plaintiff should move for judgment upon the facts proved and admitted, of which those material were as follow.

The River Lune, which is neither tidal nor navigable, flows through the manor or honor of Hornby, in Yorkshire. From an inquisition *post mortem* taken in the thirteenth year of Edw. I., it appears that one Sir Geoffrey de Neville held the manor with the appurtenances, and that he "also held the fishery of all the waters of Hornby." The manor passed down into the possession of George Earl of Cardigan, who in 1711 enfranchised some land in the township of Grassingham within the manor. This land, called Wood's Ayre, did not then abut on the river.

By the deed of enfranchisement the lord excepted and reserved from the grant of the premises his seigniorial rights and services, tithes and compositions, and also all manner of free warrens. . . . Together also

¹ This report was postponed pending an appeal. The case came before the Court of Appeal during the last sittings, but was there settled by the parties.

with free liberty of hunting, hawking, fishing, and fowling in and upon the premises or any part thereof, at seasonable and convenient times of the year. In 1780 the manor was forfeited on the attainder of its lord, Colonel Charteris, but was re-granted, with free liberty of fishing in all the waters of the manor, and in 1783 came into the hands of Mr. John Marsden. His heir-at-law, after establishing his right to it in the action of *Tatham v. Wright*, 2 Russ. & My. 1; 1 A. & E. (Ex Ch.) 3, sold it, and the purchaser afterwards sold it to the plaintiff, who is now the lord of the manor.

The enfranchised land, Wood's Ayre, in the township of Grassingham, came into possession of the defendant. It is adjacent to the part of the manor lands belonging to the plaintiff and in the township of Tarleton. The boundary of the townships was also the boundary between the two properties.

Prior to 1838 the River Lune flowed wholly within these Tarleton lands of the plaintiff. It ran parallel to the defendant's land, but land belonging to the plaintiff was between the river and the boundary of the defendant's land.

From observations made and noted on a map by a steward of the defendant's predecessor in title, it appeared that between 1838 and June, 1843, the river had by invisible progress moved sideways towards the defendant's land and was wearing away the plaintiff's land which intervened. By November, 1843, it had moved further in the same direction, and it continued to do so until it encroached to some extent upon the land of the defendant, who, in 1853, stopped further encroachment by making an embankment. As a strip of his land now formed part of the river bed, he claimed a right to go upon that part to catch salmon which came there, and in assertion of such right he committed the acts alleged by the plaintiff to be trespasses.

June 24, 1878. *Herschell, Q. C.*, and *Crompton*, for the plaintiff, moved for judgment.

C. Russell, Q. C., and *R. S. Wright*, for the defendant.

Cur. adv. vult.

July 3. LINDLEY, J. The plaintiff in this case is lord of the manor of Hornby, and claims the exclusive right to fish in the River Lune between two points where that river is neither tidal nor navigable; and before the enfranchisement hereafter mentioned, the river between those points was locally situate within the manor of Hornby.

This manor formerly belonged to the Crown. In the reign of Edward I. it was granted, with the right to fish in all the waters of the manor; and it remained in private hands for several centuries. In the year 1711 certain lands held of the manor, but not abutting on the river, were enfranchised, and these lands now belong to the defendant. After this enfranchisement the manor became forfeited to the Crown; but it was re-granted, with the free liberty of fishing in all its waters, to the predecessors in title of the plaintiff.

From the earliest times, the lands adjoining the river on both sides of it belonged to the lord; and such was the case both when the defendant's lands were enfranchised, and when the manor was re-granted by the Crown as above mentioned. In other words, until comparatively modern times, the river did not abut on the lands of the defendant. Neither when the defendant's lands were enfranchised, nor when the manor was re-granted out, did any part of the river either abut on or flow through the defendant's lands. Under these circumstances I am unable to see that the deed of enfranchisement has any bearing on the case. That deed reserved to the lord whatever rights of fishing he had in any water flowing through or bounding the lands enfranchised; but it did no more, and at the date of the enfranchisement the Lune was not one of such waters; neither did the re-grant from the Crown confer upon the grantee of the manor any right to fish in the river as distinguished from any other waters of the manor.

The counsel for the defendant suggested that the terms of the new grant did not confer on the grantee any right of fishery, except as incidental to the ownership of the land on the banks and under the river; but it was conceded that as the river was then situate, the grantee from the Crown acquired such ownership; and, in the view which I take of this case, it is not material to determine whether the grantee acquired his exclusive right to fish in the river as an incident to the ownership of the bed of the river, or whether he acquired an exclusive right to fish independently of such ownership.

Since the re-grant of the manor, the course of the river between the points above referred to has gradually changed; its bed has gradually approached nearer and nearer to the defendant's land; and now some portion of that land has become part of the river bed. This part can still be identified, and its boundary can be ascertained. The question we have to determine is, whether the plaintiff's exclusive right of fishing extends over so much of the water as flows over land which can be identified as formerly part of the defendant's property.

I am of opinion that it does. The change of the bed of the river has been gradual; and although the river-bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all, except by comparing its position of late years with its position many years before. Under these circumstances I am of opinion that, for all purposes material to the present case, the river has never lost its identity, nor its bed its legal owner.

Gradual accretions of land from water belong to the owner of the land gradually added to: *Rae v. Yarborough*, 3 B. & C. 91; 5 Bing. 163; and, conversely, land gradually encroached upon by water ceases to belong to the former owner: *In re Hull and Selby Ry. Co.*, 5 M. & W. 327. The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history

of the law shows this to be the case. Our own law may be traced back through Blackstone (vol. ii. c. 16, pp. 261, 262), Hale (De Jure Maris, cc. 1, 6), Britton (book ii. c. 2), Fleta (book iii. c. 2, §§ 6, &c.), and Bracton (book ii. c. 2), to the Institutes of Justinian (Inst. ii. 1, 20), from which Bracton evidently took his exposition of the subject. Indeed, the general doctrine, and its application to non-tidal and non-navigable rivers in cases where the old boundaries are not known, was scarcely contested by the counsel for the defendant, and is well settled. See the authorities above cited. But it was contended that the doctrine does not apply to such rivers where the boundaries are not lost; and passages in Britton (*ubi supra*), in the Year-Books (22 Ass. p. 106, pl. 93), and in Hale, De Jure Maris (book i. c. 1, citing 22 Ass. pl. 93), were referred to in support of this view: *Ford v. Lacy*, 7 H. & N. 151, was also relied upon in support of this distinction. Britton lays down as a general rule that gradual encroachments of a river inure to the benefit of the owner of the bed of the river; but he qualifies this doctrine by adding, "If certain boundaries are not found." The same qualification is found in 22 Ass. pl. 93, which case is referred to in Hale, *ubi supra*. But, curiously enough, this qualification is omitted by Callis in his statement of the same case: see Callis, p. 51; and on its being brought to the attention of the court in *In re Hull and Selby Ry. Co.*, the court declined to recognize it, and treated it as inconsistent with the principle on which the law of accretion rests. Lord Tenterden's observations in *Rex v. Yarborough*, 3 B. & C. 106, are also in accordance with this view; and although Lord Chelmsford in *Attorney-General v. Chambers*, 4 De G. & J. 69-71, doubted whether, where the old boundaries could be ascertained, the doctrine of accretion could be applied, he did not overrule the decision of *In re Hull and Selby Ry. Co.*, which decided the point so far as encroachments by the sea are concerned.

Upon such a question as this I am wholly unable to see any difference between tidal and non-tidal or navigable or non-navigable rivers; and Lord Hale himself says there is no difference in this respect between the sea and its arms and other waters: De Jure Maris, p. 6. The question does not depend on any doctrine peculiar to the royal prerogative, but on the more general reasons to which I have alluded above. In *Ford v. Lacy* the ownership of the land in dispute was determined rather by the evidence of continuous acts of ownership since the bed of the river had changed, than by reference to the doctrine of gradual accretion; and I do not regard that case as throwing any real light on the question I am considering.

Supposing, therefore, that the plaintiff's right to fish in the Lune depends on his ownership of the soil of the river-bed, I am of opinion that the plaintiff has that right; for if he was the owner of the old bed of the river, he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed; and the title so gradually and imperceptibly acquired cannot be defeated

by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title.

But, supposing the plaintiff's right of fishing not to have been the consequence of his ownership of the soil, — supposing him to have had only a right to fish in the Lune, — I am of opinion that he has the same right of fishing in the river in its present bed as he had of fishing in the river in its old bed. I am wholly unable to see upon what principle a change in the course of a river, so gradual that it cannot be perceived until after the lapse of a long interval of time, can affect the rights of those entitled to use it, whether for fishing or any other purpose; nor is there any authority for holding them to be affected thereby. The *Mayor of Carlisle v. Graham*, Law Rep. 4 Ex. 361, is no such authority; for in that case the old and the new beds of the river existed as two distinct beds; the new bed was not, as here, formed by the old one gradually shifting its place: then, the water gradually left the old bed, and followed an entirely new course always distinguishable from the old; whilst here, there has been and is only one bed, and its change of place has only become perceptible after the lapse of years. The physical changes are totally different in the two cases.

Whether, therefore, the exclusive right of the plaintiff to fish in the river in question is an incident to his ownership of the soil or is independent thereof, I am of opinion that he is still entitled to such exclusive right in the river as it now exists, and as it will exist if it continues gradually to change its course; and consequently I am of opinion that judgment ought to be entered for the plaintiff.

LORD COLERIDGE, C. J. I have had the advantage of reading the judgment prepared by my Brother Lindley, and I entirely concur in the result at which he has arrived. Nor should I add anything, but that I am not quite satisfied to base my conclusion so much as he does upon the proposition that the grant of the fishery, in such terms as are used in the two grants in this case, carries with it the right of the soil, and that the soil therefore of the River Lune as it varies gradually from time to time passes irrespective of the *medium filum* to the plaintiff. I do not say that it does not, but I am not satisfied that it does. If the whole soil over which the River Lune flowed passed by the first grant, and, after the death of Colonel Charteris, by the second to the predecessor in title of the plaintiff, I think the consequence as to gradual accretion, which my Brother Lindley draws from that premise, does in legal reasoning follow from it. But I confess I somewhat doubt the premise. The safer ground appears to me to be that the language as to the fishery in both the earlier and the later grants conveys what it expresses, — a right to take fish, and to take it irrespective of the ownership of the soil over which the water flows and the fish swim. The words appear to me to be apt to create a several fishery, *i. e.*, as I understand the phrase, a right to take fish *in alieno solo*, and to exclude the owner of the soil from the right of taking fish himself; and such a fishery I think would follow the slow and gradual changes of a river, such as

the changes of the Lune in this case are proved or admitted to have been.

I agree, for the reasons given by my Brother Lindley, that the case of *Mayor of Carlisle v. Graham* is distinguishable from the case before us; and upon these grounds I concur in thinking that our judgment should be for the plaintiff. *Judgment for the plaintiff*.¹

¹ In *Hindson v. Ashby*, L. R. [1896] 2 Ch. 1, plaintiffs' predecessors acquired a piece of land bounded on one side by the river Thames. The land ended in an almost perpendicular bank five or six feet high, to which the water reached. The water later receded, and a deposit took place at the foot of the bank. The court did not consider it necessary to decide whether the plaintiffs were entitled to this deposit as an accretion, but it intimated that they were not. LINDLEY, L. J., said, page 18: "Whether, apart from the statute of limitations, the accretions, or the land left by the water, can become the property of the plaintiffs or cease to be the property of the defendant, is a question of considerable difficulty, and one which, in my view of the facts, it is not now necessary to decide. Passages were cited from Bracton, Britton, Fleta, and Hale, De Jure Maris, c. i. and vi., and the Year-Book, 22 Ass. fo. 106, pl. 98, to shew that the doctrine of accretion does not apply where boundaries are well defined and known. This may be if the boundary on the waterside is a wall, or something so clear and visible that it is easy to see whether the accretions, as they become perceptible, are on one side of the boundary or on the other. But I am not satisfied that the authorities referred to are applicable to cases of land having no boundary next flowing water, except the water itself. The cases of *Rex v. Lord Yarborough*, affirmed by the House of Lords in *Gifford v. Lord Yarborough* and *In re Hull and Selby Ry. Co.*, seem opposed to those authorities, if applied to fluctuating water boundaries. The judgments in *Scrutton v. Brown* point in the same direction. On the other hand, *Attorney-General v. Chambers* seems the other way. But it is unnecessary to dwell more on this question, and I leave it for reconsideration and decision when it shall arise."

A. L. SMITH, L. J., said, p. 27: "I must add that I very much doubt if the plaintiffs can invoke the doctrine of accretion as applying to a case where, as here, the old line of demarcation between the plaintiffs' land and the river has always been in existence and still remains patent for all to see. I allude to the old 6 ft. bank.

"It cannot be denied that authority is to be found in the books, for instance, in Hale, De Jure Maris, Britton, Fleta, Bracton, the Institutes of Justinian, and the Year-Books, all of which will be found referred to by Lindley, L. J., when Lindley, J., in his judgment in *Foster v. Wright*, and also in the judgment of Chelmsford, L. C., in *Attorney-General v. Chambers*, *Rex v. Lord Yarborough*, and in other cases, which would lead to the conclusion, that in a case with such metes and bounds ever existing as in the present, the doctrine of accretion would not apply.

"The case upon which counsel for the plaintiffs relied to shew that although there might be metes and bounds, yet the doctrine of accretion did apply, was that of *Foster v. Wright*. In that case, in which the question was as to whether the owner of a fishery in a river could follow his fishery when the river gradually and imperceptibly changed its course and ate into the soil of another, although after many years the encroachment upon that other's soil could be identified, Lindley, J., held that it could be followed; and, if I may be permitted to say so, I agree with him; but that learned judge said: 'The change of the bed of the river has been gradual; and, although the river bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor in fact at all, except by comparing its position of late years with its position many years before.' This, I would point out, is not so in the present case; for, as before stated, the old 6 ft. bank has been ever standing where it is. There stands the old line of demarcation of the plaintiffs' land, and there it has stood clearly defined whenever the deposit of alluvium by reason of the silting up of sand became such as to be in itself apparent, and

DEERFIELD v. ARMS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1835.

[Reported 17 Pick. 41.]

WRIT of entry to recover a parcel of land containing about five acres, recently formed by alluvial deposits on the margin and bed of Deerfield River. The land lies and has been formed in a bend of the river curving southerly and easterly from the river. The case was tried before Shaw, C. J.

The demandants claimed the land in question as owners of the land on the east bank of the river at the time of the accretion. The tenant claimed to hold it as an accretion to his own land lying higher up on the southerly and easterly side of the bend on the river.

One question, reserved for the opinion of the whole court, was whether the demandants had proved their title to the land on the east bank of the river in virtue of which title alone they could claim the accretion. This depended almost exclusively on the early records of the proprietors of the township of Deerfield, and the town and the parish surveys, grants, and other documents.

The tenant contended, that supposing the demandants' title to the land on the east bank to be established, still it would not entitle them to any part of the alluvial formation, because he maintained that he and those under whom he claimed had been in possession of some part of the alluvial formation for near sixty years; and that as it commenced making on the southwesterly side, it had never reached the east bank of the river, and therefore it could not be said to be an accretion to it. It was testified that between the eastern bank of the river and the alluvial land in controversy, there is a low place into which a small brook falls; and that often there is water in it, but that sometimes it is dry.

then and at that very moment, when the first, and indeed every subsequent accretion, became apparent, so also at the same identical time it became perceptible to the ordinary observer that the accretion so formed was no part of the plaintiffs' land.

"This certainly differentiates this case from *Foster v. Wright* in an essential particular; and, as at present advised, I doubt extremely whether the doctrine of accretion applies at all to the present case.

"The whole doctrine of accretion is based upon the theory that from day to day, week to week, and month to month a man cannot see where his old line of boundary was by reason of the gradual and imperceptible accretion of alluvium to his land. How can this apply to a case like the present, when the whole thing is at once patent?"

In *Widdecombe v. Chiles*, 178 Mo. 195 (1902), lot A, owned by the defendant, had originally been separated from the Missouri River by lot B. The river gradually washed away all of lot B and part of lot A, and later gradually restored all of both lots and added land to what had originally been lot B. The original bounds of lot A were known. Held, that, when the intervening lot B had been washed away, lot A became riparian land, and the defendant was entitled to all the land so restored and added. *Welles v. Bailey*, 55 Conn. 292 (1887), *Peuker v. Canter*, 62 Kan. 363 (1901), accord. *Ocean City Association v. Shriver*, 64 N. J. L. 550 (1900), contra. add 1009.Y. 424

If the court should be of opinion that the demandants were entitled to recover any part of the land in controversy, the amount and proportion to which they were entitled was to be determined by an assessor or commissioners, conformably to such rules as the court should establish.

Alvord and Wells, for the demandants.

Billings, R. E. Newcomb, and H. G. Newcomb, for the tenant.

SHAW, C. J., delivered the opinion of the court. There are several points in this cause to which it seems proper to allude in the outset, and upon which we entertain no doubt.

In the first place it seems very clearly settled that, upon all rivers not navigable (and all rivers are to be deemed not navigable above where the sea ebbs and flows), the owner of land adjoining the river is *prima facie* owner of the soil to the central line, or thread of the river, subject to an easement for the public to pass along and over it with boats, rafts, and river craft. This presumption will prevail in all cases, in favor of the riparian proprietor, unless controlled by some express words of description which exclude the bed of the river, and bound the grantee on the bank or margin of the river. In all cases, therefore, where the river itself is used as a boundary, the law will expound the grant as extending *ad filum medium aquæ*.

We also consider it as a well-settled principle of law, resulting in part from the former, that where land is formed by alluvion, in a river not navigable, by slow and imperceptible accretion, it is the property of the owner of the adjoining land, who for convenience, and by a single term, may be called the riparian proprietor. And in applying this principle, it is quite immaterial whether this alluvion forms at or against the shore, so as to cause an extension of the shore or bank of the river, or whether it forms in the bed of the river and becomes an island. And where an island is so formed in the bed of the river as to divide the channel and form partly on each side of the thread of the river, if the land on the opposite sides of the river belong to different proprietors, the island will be divided, according to the original thread of the river, between the rival proprietors.

This view of the subject disposes of one of the questions of fact, in relation to which some evidence was given; namely, whether the alluvial formation in controversy was separated by water from the eastern bank of the river, claimed by the demandants as riparian proprietors, or whether the newly formed land, at that point, extends quite to the eastern bank. We think this fact entirely immaterial to the rights in controversy between these parties.

But by far the most difficult question in this cause, is, whether the demandants have established a title to the land lying on the easterly bank of the river at the place in question, so as to constitute them riparian proprietors, in which character alone they can maintain the claim which they assert in this action. It is true that the title to the land on the easterly side of the river is not claimed by the defend-

ant; still, the demandants must recover by the strength of their own title and not by the weakness of the defendant's, and as the demandants aver that they are seised of this land, and this averment is material to their title, and is traversed and put in issue by the defendant, it is a fact to be proved. As, however, no counter title is set up by the defendant, it is obvious that a *prima facie* title will be sufficient.

[The Chief Justice here went into an examination of the evidence of the demandants' title to the land on the eastern side of the river at the place in question, drawing the conclusion that they were seised of the same. He then proceeded:]

Considering that the town have established their title as riparian proprietors to a certain portion of the alluvial formation in question, it only remains to inquire how it shall be divided. This is a curious, and in many aspects in which it may be presented would be a very difficult, subject, as well as the analogous one of the division of flats, or land bounding on salt water, over which the tide ebbs and flows, among coterminous riparian proprietors, were it necessary to prescribe a general rule applicable to all supposable cases. But I do not think it necessary to discuss this subject at large, because the circumstances of the present case do not require it.

As neither of the riparian proprietors can establish any claim superior to the other, it is manifest that the newly acquired land must be divided equally between the parties, in proportion to the land which they respectfully hold as riparian proprietors, and in virtue of which the law attributes to them this acquisition.

The facts of the present case show, and it appears by the plan, which is made part of the case, that the alluvion is formed in a bend of the river, extending along in front of the lands of several different owners.

The object is, to establish a rule of division among these proprietors, which will do justice to each, where no positive rule is prescribed, and where we have no direct judicial decisions to guide us. The case most analogous to the present, which has occurred in this Commonwealth, is that of the division of flats ground, among coterminous proprietors, conformably to the general principle laid down in the Colony ordinance, giving to the proprietors of lands bounding on salt water, where the tide ebbs and flows, propriety to low-water mark, with some qualifications. *Rust v. Boston Mill Corp.*, 6 Pick. 158; *Emerson v. Taylor*, 9 Greenl. 44. In both cases we think two objects are to be kept in view, in making such an equitable distribution; one is, that the parties shall have an equal share in proportion to their lands, of the area of the newly formed land, regarding it as land useful for the purposes of cultivation or otherwise, in which the value will be in proportion to the quantity; the other is, to secure to each an access to the water, and an equal share of the river-line in proportion to his share on the original line of the water, regarding such water-line in many situations as principally useful for forming landing-places, docks, quays, and other ac-

commodations with a view to the benefits of navigation, and as such constituting an important ingredient in the value of the land. Without attempting to establish a rule of general application, we think that the one which shall most nearly, in general, accomplish these two conditions, will come nearest to doing justice.

A rule which appears to us to be applicable to the present case and meets the required conditions, is found in a work of the civil law, cited by the learned counsel who opened the case for the demandants, entitled "A Collection of New Decisions," by Denisart, published in France in 1783. It is in the form of a dictionary, and this subject is discussed under the title, *Attérissement*.

The rule suggested in this work is founded upon the obvious consideration already alluded to, that in many cases lands which border upon navigable rivers derive a great part of their actual value from that circumstance, and from the benefit of the public easement thereby annexed to such lands; and that being wholly deprived of the benefit of that situation would operate as a great hardship and do real injustice to a riparian proprietor, although he should obtain his full proportion of the land measured by the surface. This injustice will be avoided by the proposed rule, in conformity with which each proprietor will take a larger or smaller proportion of the alluvial formation, and of the newly formed river or shore line, according to the extent of his original line on the shore of the river.

The rule is, 1. To measure the whole extent of the ancient bank or line of the river, and compute how many rods, yards, or feet each riparian proprietor owned on the river line. 2. The next step is, supposing the former line, for instance, to amount to 200 rods, to divide the newly formed bank or river line into 200 equal parts, and appropriate to each proprietor as many portions of this new river line as he owned rods on the old. Then, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the old, to the points thus determined as the points of division on the newly formed shore. The new lines, thus formed, it is obvious, will be either parallel, or divergent, or convergent, according as the new shore line of the river equals or exceeds or falls short of the old.

This mode of distribution secures to each riparian proprietor the benefit of continuing to hold to the river shore, whatever changes may take place in the condition of the river by accretion; and the rule is obviously founded in that principle of equity upon which the distribution ought to be made. It may require modification, perhaps, under particular circumstances. For instance, in applying the rule to the ancient margin of the river, to ascertain the extent of each proprietor's title on that margin, the general line ought to be taken, and not the actual length of the line on that margin if it happens to be elongated by deep indentations or sharp projections. In such case it should be reduced, by an equitable and judicious estimate, to the general available line of the land upon the river. We are not aware that in the present case any

such modification will be necessary, and therefore the general rule may be applied, and will do justice between the parties.¹

MILLER v. HEPBURN.

COURT OF APPEALS OF KENTUCKY. 1871.

[Reported 8 Bush, 326.]

JUDGE HARDIN delivered the opinion of the court.

The appellees, claiming title as the children and representatives of William Preston, deceased, to some lots of ground in the city of Louisville, situated near the foot of Jackson Street, and between Fulton Street and the Ohio River, instituted their actions against the appellants in June, 1867, for the recovery of parts of the lots then in the defendants' possession, they owning and occupying an adjacent lot, which, with those of the plaintiffs and the interference in controversy, is shown by the diagram here inserted; the plaintiffs owning in the largest lot, No. 4, the lots in controversy, which when laid off in 1830 abutted on the *then* line of the river at the letter G, but now, as contended by the appellees, are in consequence of an alluvion formed in front of them, and the consequent recession of the river, prolonged to the present water-line at the letter H; while the defendants, who own the lot No. 5, claim that as the accretion was formed and the river receded, their west line, which terminated originally at the letter G, was gradually extended till it reached the present water-line at the letter K, crossing each of the plaintiffs' lots extended, as claimed by them, so that the ground in dispute is that indicated by the letters G, H, I, J.

The defences involved both a denial of the alleged title of the plaintiffs and an assertion of right in the defendants for substantially the following reasons: *First*, that the law continued the natural course of their side-line from the point G towards K as the river receded; *second*, that as the accretion was formed, said line was extended and adopted by the concurrence and acquiescence of the owners and tenants in possession of the adjacent lots; *third*, that the plaintiffs were barred by continued adverse possession of the ground in controversy.

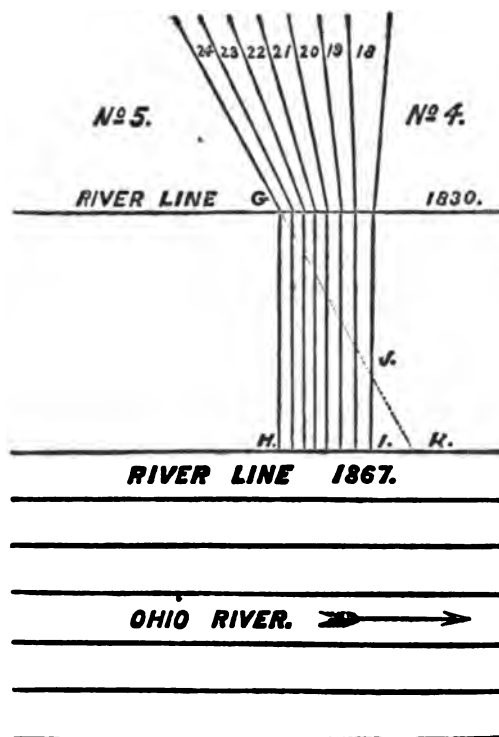
The court was of the opinion that plaintiffs, as *riparian* proprietors of their lots originally fronting on the river, were entitled to the land added thereto by accretion, to be ascertained by extending the original

¹ The rules on the cognate subject of dividing flats are given in a note by the reporter to the case of *Commonwealth v. Roxbury*, 9 Gray, 451, 521-523 (1857).

See *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. 544 (1852), where it is said, p. 552: "In ascertaining the thread of the river, it will be proper to take the middle line between the shores upon each side, without regard to the channel, or lowest and deepest part of the stream."

river frontage of the respective lots, as nearly as practicable, at right angles with the course of the river to the thread of the stream, and rendered judgments in accordance with that conclusion; and these appeals are prosecuted for the reversal of those judgments.

The first question to be decided is, whether the rule adopted by the court for determining the extent of the plaintiffs' recovery, if they were



entitled to recover at all, was correct. In the very able and ingenious argument of the counsel for the appellants in this court, the general principle is not questioned that in ascertaining the rights of a *riparian* proprietor no importance should be given to the quantity or figure of his entire tract, nor the course of its side-lines; and we presume it unnecessary to resort to authority or illustration to prove that the appellants could not acquire title to the ground in controversy merely because of the oblique direction of the western side-line of their lot with reference to the general course of the river. But it is insisted for the appel-

lants, in substance, that the court erred in adopting an arbitrary method of determining the relative rights of the parties by extending the side-lines of the plaintiffs' lots from their respective original *termini* on the shore as nearly as possible at right angles with the course of the river to the centre of the stream, instead of so drawing the lines as to give to each *riparian* proprietor such a proportion of the alluvial soil as the total extent of his front-line bears to the total quantity of the alluvial soil to be divided, without regard to the general course of the river or the centre of the stream; and we are referred to the cases of *Deerfield v. Arms*, 17 Pickering, 41; *Jones et al. v. Johnston*, 18 Howard, 150; *Johnston v. Jones et al.*, 1 Black, 209, as authority for this method of equitable apportionment.

In the first cited case it does not distinctly appear whether *Deerfield*

River, on which the alluvion was formed, was technically and according to the common law a navigable stream; all rivers being thereby deemed not navigable "above where the sea ebbs and flows." But it is apparent from the reasoning of the court in that case, as well as the other two cases cited, that the rules intended to be applied were those usually adopted for determining the relative rights of riparian owners of the banks of navigable rivers and lakes, and the division of flats on the sea-shore, or on coves in which the tide ebbs and flows. And as is properly said in the able and lucid opinion delivered by the special judge who decided these cases in the court below: "The rules thus laid down may be eminently proper in the division of the accretion upon the shores of navigable streams where the tide ebbs and flows, because the proprietor adjoining the edge of such river only owns to the water's edge, and low water is the end of the line; and hence, as the shore changes, the respective lines on such shore must change; but in a river not navigable — that is, where the tide does not ebb and flow — the proprietor does not stop at low water, but by permission and sufferance of the State he goes to the middle of the stream, and must have his shore-front to the middle; and it is a matter of little consequence whether islands are formed, or whether there is an accretion on the shore, or whether the water remains as it was when he received his grant; he is entitled to his front to the centre of the stream."

With reference to the distinction here taken, we are aware that jurists have differed in opinion whether in this country, as in England, the existence of tide water should be the test of navigability, so far as riparian rights may be involved, the Ohio and many other fresh-water streams being practically navigable, subservient to commerce, and subject to maritime jurisdiction, though above and unaffected by the tide. But whatever contrariety of authority there may be on that question, it may be regarded as settled in this State in favor of the common law rule since the decision of the case of *Berry v. Snyder, &c.*, 3 Bush, 266.

With a proper application of that rule in this case the solution of the question under consideration cannot be difficult. It does not appear that the general course and central thread of the river opposite to the ground in dispute cannot be ascertained under the judgment in these cases with sufficient certainty for practical purposes; and if it be true, as in effect adjudged by the lower court, that the several owners of the river-bank at which the accretion was formed were entitled to an extension of the original river-fronts of their lots across the accretion, upon lines drawn as nearly as practicable at right angles with the centre of the river, the only difficulty would seem to be in determining the course on which these lines should be drawn with reference to each other and the thread of the river at the terminus of each of the lines, which would be necessarily parallel or convergent or divergent, as the relative lengths and courses of the original shore-line and central line of the river might differ.

GROVER, J. The only questions in this case were upon the two exceptions taken by the appellant to the charge to the jury. The judge charged, that where a man's line is a stream of water, if natural causes added to the soil by accretion, the soil thus added belonged to the owner of the bank or shore. To this the appellant excepted. He further charged, that if such natural accretion took place where the boundary line was a pond, such accretion belonged to the adjacent owner when the accretion was deposited.

The first proposition charged it is scarcely necessary to discuss, as the question involved in the case is more distinctly presented by the exceptions taken to the second. That question is, whether, under the facts of this case, the boundary in the deed under which the plaintiff, by several mesne conveyances, makes title, establishes a fixed and permanent line, or whether such line would follow a change in the water of the pond if produced by natural causes. The proof shows that at the time of the conveyance the grantor owned all the lands claimed by both parties. He conveyed the land claimed by the plaintiff, describing the disputed boundary as follows: Commencing (for this purpose) at a store lately owned by Jarvis Bloomfield, standing in the southwest corner of his lot, thence south fifty-five degrees east one chain and seventy-nine links to a stake near the high-water mark of the pond of the grist mill, thence northeasterly along the high-water mark of said pond to the upper end of said pond, or to the north line of said lot number nine. The question is as to this last boundary. The pond was an artificial one, raised by a dam across a running stream, for the purpose of creating power to propel the machinery of mills then owned by the grantor and included in the deed. The proposition where the boundary is upon a stream is correct, with the qualification that such accretion of alluvium, to inure to the riparian owner, must be imperceptible; that the amount added in any moment could not be perceived. *Halsey v. McCormick*, 18 N. Y. 147; 3 Kent, 428; Angell on Water-courses, § 53 and note. I do not think that there is any distinction in this respect between a boundary upon a running stream of water and a pond. Failing to make this qualification may not have prejudiced the appellant. If his counsel thought it would, he should have called attention to it, and requested a modification of the charge in this respect.

But this does not reach the real question in the case; that is, whether the boundary was not made by the deed fixed and permanent, so that if the water from natural causes encroached upon the land beyond high-water mark, as it was at the time of the giving the deed covering a portion of such land, the land so covered would not have remained the property of the grantor; and whether, on the other hand, if the water of the pond, from such causes, had receded so as to leave dry land below the then high-water mark, such land would not be the property of the grantee, or whether the line would continue to be the high-water mark of the pond as changed by such causes. It may be remarked that the reason given in the cases where the boundary is

upon the banks of the stream that it should go to low-water mark, and in some cases for giving the alluvium insensibly formed to the riparian owner, — that the party should not be cut off from, but continue to have access to the water for use, — has no application to the case. The line was fixed at the high-water mark of the pond. Hence the grantor reserved to himself no interest whatever in the water or the land covered by it. He could not, without trespassing, reach the water at all, only when at high-water mark, and then he had no right to or in it for any purpose. The land between high and low water mark clearly passed to the grantee under the deed. Again, the grantor was under no obligation to keep up the dam or pond. He could cut down the dam and use the land for any purpose he chose. Should the pond from any cause fill up along the disputed boundary, he had the right of clearing it out up to the line. Had the bank been partially washed away by the action of the water, the grantor had the right of filling in to the line. But these rights would not exist, should the line be held to continue at high-water mark, as that might from time to time be changed by the action of the water from natural causes. This right, claimed by the defendant, of acquiring title by accretion, if it existed, could be terminated by the plaintiff by a removal of the dam. I think the language of the deed indicates a clear intention to establish a fixed and permanent line, and not one changeable by the changes in the high-water mark of the water in the pond. It follows that the charge, when applied to the facts in this case, was erroneous. The boundary between the parties was the high-water mark at the time of the deed to Bradley, and the jury should have been so charged. Whether alluvium had been formed had nothing to do with the case. The evidence was such that the jury may have found that the land in dispute was alluvium, formed by the natural action of the water below this line; and if so, under the charge they would have found it was the defendant's; while if the fact was so, the title was in the plaintiff.

The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

All concur, except CHURCH, C. J., not voting.

*Judgment reversed.*¹

¹ See *Eddy v. St. Mars*, 58 Vt. 462 (1881).

In *Boorman v. Sunnucks*, 42 Wis. 238 (1877), it was said that an abutter on a natural pond, the soil of which is in the State, or the United States, acquires title to land left by imperceptible reliction. *Fuller v. Shedd*, 161 Ill. 462 (1896); *French Live Stock Company v. Springer*, 35 Or. 312 (1899), *accord*.

In *Hodges v. Williams*, 95 N. C. 331 (1886), it was *held*, that if the bed of a natural pond had been granted by the State, an abutter on the pond would not acquire title to land left by gradual reliction; and it was said that the same would be true in the case of unnavigable streams. *Sed qu.*

CHAPTER II.

LAPSE OF TIME.

NOTE. — After original acquisition, the next kinds of acquisition to consider are those where the things acquired have been the property of some one before the acquisition, but where the persons acquiring them do not in any way base their ownership on the title of any particular former owners, but get a title good against all the world. These modes of acquisition are two: I. The taking of land, by or under the authority of the State, for public purposes or to discharge taxes laid in substance, if not in form, on the land.

II. The acquisition of title by lapse of time.

The second only of these modes is here considered.

SECTION I.

STATUTES OF LIMITATION.

A. Statutes.

3 EDW. I. c. 39 (1275). — And forasmuch as it is long time passed since the writs undernamed were limited; it is provided, That in conveying a descent in a writ of right, none shall presume to declare of the seisin of his ancestor further, or beyond the time of King Richard, uncle to King Henry, father to the King that now is; and that a writ of *Novel disseisin*, of Partition, which is called *Nuper obiit*, have their limitation since the first voyage of King Henry, father to the King that now is, into Gascoin. And that writs of *Mortdancestor*, of Cosinage, of *Aiel*, of Entry, and of *Nativis*, have their limitation from the coronation of the same King Henry, and not before. Nevertheless all writs purchased now by themselves, or to be purchased between this and the Feast of St. John, for one year complete, shall be pleaded from as long time, as heretofore they have been used to be pleaded.

21 JAC. I. c. 16, §§ 1, 2 (1623). — For quieting of men's estates, and avoiding of suits, be it enacted by the King's most excellent majesty, the lords spiritual and temporal, and commons, in this present Parliament assembled, That all writs of *formedon in descender*, *formedon in remainder*, and *formedon in reverter*, at any time hereafter to be sued or bought, of or for any manors, lands, tenements or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session of Parliament: and after the said twenty years expired, no such person or persons, or any of their heirs, shall have or maintain any such writ, of or for any of the said manors, lands, tenements or hereditaments; (2) and that all writs of *formedon in descender*, *formedon in remainder*, and for-

medon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years;¹ (3) and that no person or persons that now hath any right or title of entry into any manors, lands, tenements or hereditaments now held from him or them, shall thereinto enter, but within twenty years next after the end of this present session of Parliament, or within twenty years next after any other title of entry accrued; (4) and that no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law or Statute to the contrary notwithstanding.

II. Provided nevertheless, That if any person or persons, that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be at the time of the said right or title first descended, accrued, come or fallen, within the age of one and twenty years, *feme covert, non compos mentis, imprisoned or beyond the seas*, that then such person or persons, and his or their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this Act; (2) so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discovery, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years.

B. Operation of the Statute.

STOKES v. BERRY.

NISI PRIUS. 1699.

[Reported 2 Salk. 421.]

If A. has had possession of lands for twenty years without interruption, and then B. gets possession, upon which A. is put to his ejectment, though A. is plaintiff, yet the possession of twenty years shall be a good title in him, as if he had still been in possession. Ruled *per* HOLT, C. J. The same point was ruled by HOLT, C. J., at Lent Assizes for Bucks, 12 W. 3, because a possession for twenty years is like a descent, which tolls entry, and gives a right of possession, which is sufficient to maintain an ejectment.

¹ See *Tolson v. Kaye*, 3 Brod. & B. 217 (1822); *Dow v. Warren*, 6 Mass. 828 (1810).

15⁶ SCHOOL DISTRICT NO. 4 IN WINTHROP v. BENSON.
SUPREME JUDICIAL COURT OF MAINE. 1850.

[Reported 31 Me. 381.]

WRIT OF ENTRY. There was evidence tending to prove that the land formerly belonged to the ancestor of the defendants; and that the plaintiffs had occupied a portion, or the whole of it, for more than forty years, for a school-house, woodshed, and woodyard. It was proved that a wooden school-house was erected there by the plaintiffs in 1802; it was taken down and a brick school-house was built in 1818 on the lot, near the site of the wooden one. A woodshed was placed near the brick school-house in 1824. In 1847 one Samuel Wood was the school agent. He was called by the defendants as a witness, and testified that he procured the woodshed to be removed in the spring of 1847 from the north-westerly end of the school-house to the back side of the school-house at the other end; that he found the building must be removed; that it had been on another man's land on sufferance; that the defendants asserted a title, and showed it to him, and required the building to be removed; that he became satisfied the district had no title to the land, and that he removed the building for that reason. That the expense of removing it was \$25, which was paid by the town, out of the money assigned to that district.

The plaintiffs objected to said Wood's testimony as not legally admissible, but the objection was overruled. It appeared, from the records of the district, that in June, 1847, soon after the removal of the shed, they had a meeting and took action for sustaining whatever claim they had to the land.

The defendants in their argument contended that if, in 1847, the agent of the school district, at the request of the defendants, removed the woodhouse to its present location, intending to relinquish and give up the land, and the district had subsequently ratified his acts by their conduct or otherwise, of which they were the judges; then such abandonment, notwithstanding the district might before that time have had an open, adverse, exclusive, and notorious possession of the land, or some part of it, for more than twenty years, would operate an abandonment of their possession and a surrender of their claim to the former owners thereof, and the plaintiffs could not recover in this suit. The court, in opposition to the argument of the plaintiffs' counsel, gave such instructions.

The verdict was for the defendants, and the plaintiffs excepted.

May, for the plaintiffs.

Evans, for the defendants.

WELLS, J. The jury were instructed that if, in 1847, the agent of the school district, at the request of the defendants, removed said wood-

house where it now is, intending to relinquish and give up the land, and the district had subsequently ratified his acts by their conduct or otherwise, of which they were the judges, then such abandonment, notwithstanding the district might before that time have had an open, adverse, exclusive and notorious possession of the land, or some part of it, for more than twenty years, would operate an abandonment of their possession, and a surrender of their claim to the former owners thereof, and the plaintiffs could not recover the said land in this suit.

It is true, that a mere possession of land of itself does not necessarily imply a claim of right. The tenant may hold in subjection to the lawful owner, not intending to deny his right or to assert a dominion over the fee. But the terms open, notorious, adverse and exclusive, when applied to the mode in which one holds lands, must be understood as indicating a claim of right. They constitute an appropriate definition of a disseisin, and the acts which they describe will have that effect if not controlled or explained by other testimony. *Little v. Libbey*, 2 Greenl. 242; *The Proprietors of Kennebec Purchase v. John Springer*, 4 Mass. 416. An adverse possession entirely excludes the idea of a holding by consent.

If the plaintiffs have held the premises by a continued disseisin for twenty years, the right of entry by the defendants is taken away, and any action by them to recover the same is barred by limitation. Stat. c. 147, § 1.

A legal title is equally valid when once acquired, whether it be by a disseisin or by deed; it vests the fee-simple, although the modes of proof when adduced to establish it may differ. Nor is a judgment at law necessary to perfect a title by disseisin any more than one by deed. In either case, when the title is in controversy, it is to be shown by legal proof; and a continued disseisin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by the exhibition of them in evidence.

An open, notorious, exclusive, and adverse possession for twenty years would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it; and the appropriate mode of conveying it is by deed.

No doubt a disseisor may abandon the land, or surrender his possession by parol, to the disseisee, at any time before his disseisin has ripened into a title, and thus put an entire end to his claim. His declarations are admissible in evidence to show the character of his seisin, whether he holds adversely or in subordination to the legal title. But the title, obtained by a disseisin so long continued as to take away the right of entry, and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment, it must be transferred by deed. One having such title may go out of possession, declaring he abandons it to the former owner, and intending never again to make any claim to the land, and so may the person who holds an

undisputed title by deed; but the law does not preclude them from reclaiming what they have abandoned in a manner not legally binding upon them. A parol conveyance of lands creates nothing more than an estate or lease at will. Stat. c. 91, § 30.

*The exceptions are sustained and a new trial granted.*¹

HUGHES v. GRAVES.

SUPREME COURT OF VERMONT. 1867.

[Reported 39 Vt. 359.]

THIS cause was an act of trespass *quare clausum fregit*, with counts in trespass on the case joined agreeably to the Statute. The action, by the agreement of the parties, was referred, to be decided according to law, and the defendant filed exceptions to the report of the referees.

On the hearing upon the said report and exceptions at the March Term, 1866, Kellogg, J., presiding, the court, *pro forma*, decided that the plaintiff was entitled to recover of the defendant the sum of ten dollars for his damages, as stated in the report, and rendered judgment in favor of the plaintiff on the report accordingly. To this decision and judgment the defendant excepted.

The referees reported as follows: "The plaintiff and defendant are severally the owners and occupiers of adjacent lots of land in the village of Fairhaven, both lots being originally parcels of an entire lot and each party deriving title to his lot from a common source. The west line of the plaintiff's lot, as shown by his title-deeds, runs from the north-west corner of his dwelling-house, southerly to the northwest corner of the Whipple lot. This line formed the eastern boundary of ancient highway, discontinued more than fifty years since, running over the lot of the defendant. Joshua Quenton, an intermediate grantor of the plaintiff, obtained his title to the lot in 1806, and he and his heirs owned and occupied it until May, 1847. During this period the Quentons enclosed with a fence a strip of land about ten feet wide at the north end, which extended southerly and adjoining the plaintiff's west line from the said northwest corner of the plaintiff's dwelling-house, to and beyond the south line of the defendant's lot taken from said ancient highway, making a portion of their dooryard, and continued to occupy peaceably and adversely claiming it as their own for more than fifteen years. In the fall of 1847 an intermediate grantor of the defendant claims this

¹ See *Armstrong v. Risteau*, 5 Md. 253 (1853).

In *Schall v. Williams Valley R. R. Co.*, 35 Pa. 191 (1860), the court said that titles matured under the Statute of Limitations were not within the recording acts. A. acquired such a title and then abandoned the possession of the land; B. purchased from the persons having the record title, without notice of A.'s rights. Held, that the title to the land continued in A.

strip of land, sawed the fence in two where the south line of the defendant's lot would strike it. But the fence after two or three months was rebuilt by the plaintiff's grantor, and the occupation in them continued till March, 1861, as the fence was still standing when the plaintiff took possession under his deed, and when the defendant purchased his lot in April, 1862, he claimed it and in the summer of 1862 erected a store which extended eastward within about eight inches of the plaintiff's dwelling-house and covered not only a portion of the strip of land so enclosed by the Quentons taken from the old highway and the plaintiff's lot, but also a small portion of land included within the boundaries of the plaintiff's lot. None of the deeds prior to the deed of Olive Kelsey, to I. Davey, of March 23d, 1860, by and through which the plaintiff claims title to his lot, in their boundaries included the piece of land enclosed by Quenton and taken from said old highway, and which actually formed part of the dooryard to the plaintiff's house. If the court shall be of opinion that the plaintiff takes nothing by Quenton's possessory title because the land so claimed was not included in the boundaries of his deed, then we only find for the plaintiff to recover of the defendant seven dollars damages and his costs, otherwise we find for the plaintiff to recover of the defendant ten dollars damages and his costs."¹

Nicholson and Ormsbee and E. N. Briggs, for the defendant.

H. G. Wood, Prout and Dunton, for the plaintiff.

The opinion of the court was delivered by

STEELE, J. The plaintiff is in actual possession and by his deed from Olive Kelsey is entitled to the benefit of her possession. Her possession was prior to any possession by the defendant or his grantors. The plaintiff will therefore maintain this action of trespass as against the defendant by virtue of mere prior possession, unless the defendant has a right to the possession. It is then the defendant's right and not the plaintiff's which we are required to examine. The defendant shows a faultless chain of title on paper, but it turns out he does not own the land. One Quenton acquired the ownership by fifteen years' possession adverse to the defendant's grantors. The defendant's chain of deeds represents nothing in the disputed land except what his grantors lost and Quenton gained. If Quenton's title had been by deed from the defendant or his grantors, it is clear the defendant could not lawfully have disturbed the plaintiff's prior possession. Quenton had no deed, but his adverse possession for the statutory period gave him an absolute indefeasible title to the land against the whole world on which he could either sue or defend as against the former owner. That being the case, is there sufficient virtue left in the defendant's paper title to warrant him in disturbing the plaintiff's possession? Under the pres-

¹ The deed Joshua Quenton to Olive Kelsey is dated May 25th, 1847. The deed Olive Kelsey to I. Davey, is dated March 23d, 1860. The deed I. Davey to the plaintiff, is dated August 25th, 1860. The two latter deeds embraced the land in question. — RAR.

ent English Statute of Limitations it is settled there would not be. The case would stand precisely as if the defendant or his grantors had conveyed to Quenton. The plaintiff would be liable to be interrupted in his possession only by Quenton or some person under him. *Holmes v. Newland*, 39 E. C. L. 48 (11 A. & E. 44). In *Jakes v. Sumner*, 14 Mees. & Welsby, 41, Parke, B., remarking upon the present English Statute 3 & 4 W. IV. c. 27, says the effect of the Act is to make a parliamentary conveyance of the land to the person in possession after the period of twenty years has elapsed. The several English Statutes, and their supposed points of difference, are commented upon in 2 Smith's Lead. Cases, 469, 559 *et passim*, and the case *Fenner v. Fisher*, Cro. Eliz. 288, is cited in *Holmes v. Newland*, *ubi supra*, as an authority under the previous Statutes against the application to these Statutes of the full extent of the rule applied to the Statute of William IV. Any extended discussion of these English Statutes would be unprofitable here, for our Statute, though mainly borrowed at the outset from the Statute of James, was somewhat modified when transferred to Vermont, and has been materially altered in form in passing through the several revisions to which our laws have been subjected. It now provides, after the section relating to actions, that "*no person having right or title of entry into houses or lands shall thereinto enter but within fifteen years next after such right of entry shall accrue.*" The first section takes away the remedy, and the second the right. G. S. p. 442, §§ 1 and 2. The title is vested in the adverse holder for the statutory period, or, as is often said, "the adverse possession ripens into title." As a natural consequence, the former owner is divested of all the new owner acquires. This interpretation giving to adverse possession for fifteen years the effect of a conveyance, best accords with the other well-settled doctrines upon the subject of limitations as applied to real property. A covenant to convey perfect title is satisfied by conveying a title acquired under the Statute. In this country, as in England, an agreement made after the lapse of the statutory period to waive the benefit of the Statute is not effective, but the title remains in the party who has acquired it under the Statute, notwithstanding his waiver, until he conveys it back with all the solemnities required in any deed of land. In language of the books, "by analogy to the Statute of Limitations, we presume a *grant* of incorporeal rights after adverse uses for fifteen years." It would certainly be an artificial construction of the Statute which would make it a mere bar to the owner's right against the *person* only who occupied adversely. It relates to the rights of the party to the *land*. It makes no reference to *persons*. In this case, if the plaintiff's enjoyment of the land subjects him to an action or entry by Quenton on the ground that Quenton and not the defendant is the true owner, it ought not at the same time to subject him to action or entry by the defendant, on the ground that the defendant is the true owner of the land. We are satisfied that no title remains in the defendant, and that under our Statute he has no right to the possession. It

has been held that a plaintiff in possession without right could maintain trespass against even the true owner for a disturbance, while the right of possession was in a third person by lease from the owner. *Phillips v. Kent and Miller*, 3 Zabriskie, N. J. Rep. 155. Here neither the right of possession nor the ownership was in the defendant.

The plaintiff claims that upon a correct construction of the deeds he has Quenton's title. This point we have not decided. The plaintiff's prior possession will enable him to recover as against the defendant whose grantors suffered Quenton to acquire the land by adverse possession for the statutory period. *Judgment affirmed.*¹

C. Disseisin and Adverse Possession.

NOTE. — See 1 Gray, Cases on Property (2d ed.), 857-864.

LIT. § 279. And note that disseisin is properly, where a man entreteth into any lands or tenements where his entry is not congeable, *perman* and ousteth him which hath the freehold &c.

CO. LIT. 181 a. And note here that every entry is no disseisin, unlesse there be an ouster also of the freehold. And therefore *Littleton* doth not set down an entrie only but an ouster also, as an entry and a claimer, or taking of profits, etc.

1 ROLLE'S ABR. 659, PL. 5. If a man has a house, and locks it, and departs, and another comes to the house, and takes the key of the door into his hand, and says that he claims the house to himself in fee, and without any entry into the house, this is a disseisin of the house.

¹ See *Wilkes v. Greenway*, decided by the Court of Appeal (Lord Esher, M. R., Lindley and Bowen, L. J.J.), in 1890, and reported in 6 Times L. R. 449. The plaintiff admitted that the defendant had acquired by virtue of the Statute of Limitations title to certain premises surrounded by other land of the plaintiff, but denied that he had acquired a right of way by necessity to such land. The Master of the Rolls said: "The one point argued before us has been whether, assuming the premises to have passed to the defendant by virtue of the Statute of Limitations, a right of way over this approach inevitably came into existence over the plaintiff's remaining land as a way of necessity and as distinct from any other way. This point may be one which only becomes possible either on a statement of facts that is incomplete or assumptions of law that are not settled. On the hypotheses, however, so presented to us, and without further knowledge of the facts, we can only say that there is nothing in the Statute of Limitations to create ways of necessity. The Statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot import into such negative provisions doctrines of implication that would naturally arise where title is created either by express grant or by statutory enactment. The title to the premises is not a title by grant. The doctrine of a way of necessity is only applied to a title by grant, personal or Parliamentary." And see *In re Jolly*, L. R. [1900] 1 Ch. 292.

BLUNDEN v. BAUGH.

KING'S BENCH. 1682.

[Reported Cro. Car. 302.]

ERROR of a judgment in the Common Pleas. Baugh brought an ejectment of lands in Blechingley of the demise of Charles Earl of Nottingham against Blunden. Upon Not guilty pleaded, a special verdict was found, that 39 Eliz. Charles Lord Howard, Lord Admiral, being seised of the said land in tail, by indenture covenanted, in consideration of marriage betwixt Sir William Howard his eldest son and heir and Elizabeth daughter and heir of Lord St. John, to suffer a recovery of those lands to the use of the said William and Elizabeth, and the heirs males of the body of the said William, with divers remainders over; that the marriage took effect, and the said William entered by the assent of his father and occupied at his will; and in 4 Jac. 1, by indenture demised that land to Thomas Humphrys and John Humphrys for twenty-one years, rendering £115 rent: they enter, and were possessed *prout lex postulat*: and being so possessed, the said Charles, then Earl of Nottingham, and the said William, then Lord Effingham, by indenture covenanted with Sir Robert Dormer and others (for that the said indenture of 39 Eliz. was not executed for the performance of the assurances and uses comprised therein) to levy a fine of those lands to the use of the said William Lord Effingham and Elizabeth, for a jointure for the said Elizabeth, and to the heirs males of the body of the said William, the remainder over as in the indenture, &c.; which fine was levied accordingly, and to the uses in the said indenture mentioned: that in 9 Jac. 1, the said William Lord Effingham died without issue male of his body; and John Humphrys died: and in 14 Jac. 1, Thomas Humphrys being seised or possessed *prout lex postulat*, by indenture enrolled within six months, in consideration of a competent sum of money, bargained and sold the said lands to Charles Lord Effingham, son and heir apparent to the earl, and his heirs. Charles Earl of Nottingham dies; Charles, now Earl of Nottingham, being his son and heir, entered. Blunden, the defendant, by the command of the said Elizabeth, entered and claimed it as her jointure. And Charles, now Earl of Nottingham, son and heir of the said Charles Earl of Nottingham the Lord Admiral, entered, and made a lease for three years to the plaintiff, who entered; and the defendant, as servant of the said Elizabeth, and by her command, ousted him. And if *super totam materiam* the court should adjudge for the plaintiff, they found for the plaintiff; if otherwise, for the defendant; and they found the said Elizabeth to be yet alive.

After arguments at the bar in the Common Pleas and at the bench, it was, by the opinion of RICHARDSON, Chief Justice, HUTTON, and VERNON, adjudged for the plaintiff, against the opinion of HARVEY, Justice, who argued strongly for the defendant. And hereupon a writ of error was brought, and the error assigned only in the matter of law. And it was divers times very well argued at the bar by Littleton, Recorder of Lon-

don, and *Serjeant Brampton*, for the defendant in the writ of error, and by *Calthrop* and *Serjeant Henden*, for the plaintiff; and afterward by all the Justices of the King's Bench *seriatim*.

And JONES, BERKLEY, and MYSELF held, that the judgment was erroneous. The main question was, Whether by any of these acts there was a disseisin committed to Charles Earl of Nottingham *volens volens*; and if there be a disseisin, who should be the disseisor and tenant to the freehold? And to the first JONES, BERKLEY, and MYSELF held, that the law will not impute nor construe it to be a disseisin unless at the election of Charles Earl of Nottingham, when as none of the parties intended it to be a disseisin, nor to oust him of the possession; for, as Co. Lit. 158 b, defines, "A disseisin is when one enters, intending to usurp the possession, and to oust another of his freehold;" and therefore *quærendum est a judice, quo animo hoc fecerit*, why he entered and intruded; and it is at the election of him to whom the wrong is done, if he will allow him to be a disseisor, or himself out of possession; and therefore if one receive my rent, it is at my election if I will charge him with a disseisin, by bringing an assise or other action, or have an account. And if an infant make a lease for years rendering rent, and the lessee enter, it is at the election of the infant to charge him in assise, or to bring debt for the rent, or to accept the rent at his full age, as 7 Edw. 4, 6, and other books be. So it is if one enters, claiming as guardian in socage, or by nurture, where he is not, it is at the election of the infant to bring an assise, or to charge him as guardian, thereby admitting him to be in without wrong; as 49 Edw. 3, 10; 40 Edw. 3; "Accomp't," 35 and 38 Hen. 6, 2, and many other books be. And tenant at will is at the will of both parties; and the will shall not be determined by every act. *Vide* 28 Hen. 8; 62 Kelway; 20 Hen. 7, 65. So where a *feme* lessee at will takes husband, or a *feme* makes a lease at will, and takes husband, although the *feme* hath put her will in her husband, yet it shall not be said a determination without the election of the lessor or husband to the contrary. 38 Hen. 8; Dyer, 62. Lessee surrenders, and yet occupies, he is no disseisor, but at the pleasure of the lessor, 11 Ass. 6, where a man makes a feoffment and continues in possession: and the common case where a copyholder makes a lease for years, not warranted by the custom, yet it is no disseisin; and the law accounts it a good lease betwixt lessor and lessee and all strangers: and to that purpose was cited Hilary, 18 Jac. 1, Rot. 792, *Streat v. Virrall*, *ejectione firmæ* brought upon such a lease; and upon special verdict adjudged for the plaintiff, that it is a good lease against all but the lord. And they all relied upon another judgment in the point, betwixt *Powsley v. Blackman*, Cro. Jac. 659, where one Carr bargains and sells land, by indenture enrolled, to Bertram, upon condition that upon payment of three hundred pounds at the end of three years it should be void; and that in the interim the bargainee should not meddle with the profits of the land. The bargainor occupies and makes a lease for five years, and at the day doth not pay the money; the bargainee

doth not enter, but (the bargainor occupying it) he devised that land: and it was adjudged a good devise; but if he had been disseised, the devise had been void. And here it shall not be intended that the son intended to disseise his father, but that the lease was made by the assent of the father: also the party to whom the lease is made doth not claim any freehold, but to have the lease only, and to pay his rent, and pays the rent accordingly; so there was no intent in any of the parties to make a disseisin, then the law shall not construe it to be a disseisin *partibus invitis*. And hereby it follows, that the freehold remains in the Earl of Nottingham until the fine levied by him and his son; and so the uses well raised, and the jointure well assured.¹

Secondly, admitting there were a disseisin committed by these acts, the question is, Who is disseisor and tenant of the freehold? And JONES, BERKLEY, and MYSELF held, that William Lord Effingham, who made the lease, is the disseisor and tenant; for when tenant at will takes upon him to make a lease for years, which is a greater estate than he may make, that act is a disseisin; and by this lease for years made, and the lessee's entering and paying the rent unto him, and he accepting thereof, he is in as lessee, and the lessor is the disseisor, and hath the reversion expectant upon this lease; and this lease betwixt them is an interest derived out of the inheritance gained by this disseisin: for if a lessee for years make a feoffment, although it be a disseisin to the lessor, yet it is a good feoffment betwixt them *de facto*, though not *de jure*, and the feoffee is in the *per*; as 4 Edw. 2, Brev. 403; 19 Edw. 2, Brev. 770; 15 Hen. 3, Brev. 878; F. N. B. 201; 8 Hen. 7, 6, *per fineux temp.* Edw. 1, *Counterplee de Voucher*, 126; and Co. Lit. 367 a. And warranty may be annexed to such an estate,

¹ DISSEISIN BY ELECTION. An assise of novel disseisin was an action for the recovery of the possession of land, introduced probably about 1175. It was considered a speedy remedy. An allegation of a disseisin by which the demandant had been wronged was requisite; but this allegation might be supported by the proof of acts which did not constitute an actual disseisin. Such acts were held to constitute a disseisin only at the election of the demandant and in order that he might avail himself of this speedy remedy. An actual disseisin was the foundation of rights in the disseisor; it operated to the prejudice of the disseisee. A disseisin by election was not the foundation of rights in the disseisor; it did not operate at all to the prejudice of the person who elected to be disseised, but, on the contrary, afforded him a convenient remedy through which to enforce his rights.

To hold that acts constituted a disseisin by election only was to hold that they did not constitute a disseisin which might be the foundation of new rights. In *Taylor d. Atkins v. Horde*, 1 Burr. 60 (1757), A. had been entitled to certain lands for life, remainder to B. in tail, remainder to C. in tail. B. had brought ejectment against A. and recovered (but on what grounds did not appear). B., being in possession, had enfeoffed D. in fee, and D. had thereupon suffered a recovery to the use of B. and his heirs. Did D. by the entry under this tortious feoffment become a disseisor and therefore a good tenant to the *præcipe*? Lord Mansfield was of opinion that such entry was a disseisin only at the election of the persons whose estates would be prejudiced by the recovery. This was, in effect, to hold that acts which, under the older authorities, had amounted to an actual disseisin did so no longer. See Butler's Note to Co. Lit. 330 b, and 4 Kent, Com. 488-490.

By 8 & 9 Vict. c. 106 (1845), it was provided that a feoffment made after a date therein specified should not have any tortious operation.

upon which he may vouch, as 50 Edw. 3, 12. And if such lessee for years, or at will, makes a gift in tail, or a lease for life, that creates a good lease or a good gift in tail amongst themselves and all others, besides the first lessor; and as to him they are both disseisors, as it appears by the books 14 Edw. 4, 6; 18 Edw. 3, Issue, 36; 7 Edw. 3, Issue, 7; 14 Edw. 3, *Feoffments et Fays*, 67. So it is where a lessee at will makes a lease for years, especially by indenture, it is a good lease between them, and debt lies for the rent; and the lessee shall not avoid it but by an ouster by the first lessor, as 22 Hen. 7, 26, is. And JONES cited *Spark v. Spark*, Cro. Eliz. 676, where lessee at will made a lease for years, and he, being ousted by a stranger, brought an ejectment and recovered; and betwixt *Streat and Virrall*, *ut supra*. And so it was resolved in this court, 28 Eliz. that an *ejectionis firmæ* lies upon a lease made by a copyholder not warranted by the custom against any stranger; and the Year-Book of 12 Edw. 4, 13, is directly to the point: so here, when lessee for years enters according to the lease and pays his rent, the freehold betwixt them shall be in William Lord Effingham, who made the lease, and not in Humphrys, who is only lessee; and then the fine levied by the Earl of Nottingham and his son conveys well the freehold, and the uses are well raised upon this fine, and the jointure well settled; and then during her life the Earl of Nottingham hath no title to make a lease: wherefore the judgment ought to be reversed; and so much the rather for the great mischief which would ensue, if one who hath a tenant at will, who makes a lease for a small time, and the first lessor, not knowing thereof, levies a fine for a jointure for his wife, or to perform his will, or to other uses, &c. if he should be adjudged disseised, and as a disseisee to levy a fine which should tend to the benefit of the lessee for years, and be adjudged a disseisor against his intent or knowledge, as in this case is pretended, many should lose their inheritances. In many manors are divers tenants at will, where the father is tenant at will, and after him the son enters and occupies at the will of the lord, and is so reputed, and the lord allows them, and never accounted them as disseisors; if such tenants at will make under-leases for a year, or for half a year, if the lords of those manors levy fines of those manors, and this should tend to the benefit of the under-lessees, who should be reputed to be disseisors without the intent of any of the parties, many lords should hereby be disinherited: whereupon they concluded, that Humphrys the lessee was neither disseisor nor tenant, but only William Lord Effingham, and he is the disseisor and tenant; and the fine levied by Charles Earl of Nottingham, and William Lord Effingham his son, is a good fine, and the uses well raised, whereby Elizabeth the wife of the said William Lord Effingham hath good title, and the defendant under her. Wherefore the judgment ought to be reversed.

But RICHARDSON, Chief Justice, argued to the contrary, and continued his former opinion, that Humphrys is the disseisor, and was tenant of the freehold at the time of the fine levied: and then the fine by the Earl of Nottingham (being a disseisee, and his son William Lord Effing-

ham adjutor to the disseisin) shall inure to bar the right of the Earl of Nottingham, and for the benefit of the said Humphrys, according to the opinion in 2 Co. 56, *Buckler's Case*; and that he is a disseisor to the Earl of Nottingham, not at his pleasure, but *de necessario*; for a disseisin is a tortious ousting of any one from his seisin: and here this taking of the lease by Humphrys from Lord Effingham tenant at will, and his entering by color of the said lease, is a disseisin. And here is an entry *usurpando jus alienum* without consent of the Earl of Nottingham: and as tenant at will may not grant his estate, as 27 Hen. 6, pl. 3, is, no more may he make an estate; and the Earl of Nottingham hath no election to say it is no disseisin. But he agreed to the case, where an infant makes a lease for years, reserving rent, and the lessee enters, the infant hath election to allow him to be his tenant, or to be a disseisor, which is most for his advantage: so where one enters and claims as guardian and occupies, the infant may allow him either disseisor or accomptant, which shall be for his best advantage.

Secondly, he held, that Humphrys is the sole disseisor and tenant of the freehold; for he, by his entry, did the sole act which made the disseisin: for the lease for years is merely a void contract; and when one enters by color of a void conveyance, he is the disseisor, as in *Crofts v. Howels*, Plow. 530, where a guardian assigned dower to a *feme* who is not dowable, and she enters, by her entry she is a disseiseress, 24 Edw. 3, pl. 43. If one enters by color of a void extent, it is at the peril of him who enters and takes the profits, to see by what right he enters. And he denied that the making of a lease for years, is either an express or implied command to enter or make a disseisin. And he denied that the making of a lease for years had gained the reversion to the lessor; but if lessee for years, or at will, makes a lease for life, or a gift in tail, he, by making livery, transfers the freehold, and gains to himself the inheritance, but by a nude and void contract he cannot gain the reversion. Whereupon he concluded, that Humphrys is the disseisor and tenant, and that the fine inures to the benefit of Humphrys, and not to the limitation of the uses in the indenture, because none of the parties had anything in the land at the time of the fine levied; and that the judgment ought to be affirmed.

But afterwards, for the reasons of us three, the judgment was reversed.

Note, SIR ROBERT HEATH, Chief Justice of the Common Pleas, CRAWLEY, Justice, BARON DENHAM, and BARON TREVOR, agreed with this judgment in the King's Bench; and conceived, that it would be very mischievous if it should be adjudged otherwise. But SIR HUMPHRY DAVENPORT seemed to doubt whether the lessee for years ought not strictly to be taken for the disseisor and tenant.¹

¹ In *Mayor and Commonalty of Norwich v. Johnson*, 3 Lev. 35 (1681), the court said: "The Claim of the Tortfeasor cannot create a particular Estate, and so apportion his own Wrong, but of Necessity he is a Disseisor in Fee; because there is no particular or other Estate in esse."

DOE d. SOUTER v. HULL.

KING'S BENCH. 1822.

[*Reported 2 Dougl. & R. 88.*]

EJECTMENT [on the several demises of John Souter and George Chatfield and Elizabeth his wife] to recover the possession of certain freehold lands and premises situate at Midhurst, in Sussex. At the trial before *Park, J.*, at the last assizes for the County of Sussex, the case was this: Henry Souter, the father of the lessor of the plaintiff John Souter, being seised in fee of the premises in question, made his will, bearing date the 12th of June, 1788, by which he gave the same to his wife in these words, "I give to my loving wife Mary Souter all my household goods and chattels, and I give to her a barn and piece of free land at Midhurst, in Sussex." On the 7th of October, 1790, the testator died seised, leaving John Souter, who claimed to be his eldest son and heir-at-law, and his said wife, him surviving. On the 9th of October, 1794, the widow and John Souter jointly conveyed the premises to Christopher Hull, the father of the defendants, by deed of bargain and sale, who took possession and remained undisturbed therein till July, 1814, when he died, leaving his will, whereby he demised the premises to the defendants, in equal moieties. Whicher Souter was, in fact, the eldest son and heir-at-law of the testator Henry Souter, whom he survived, but he did not join in the conveyance to Mr. Hull. On the 6th of November, 1810, Whicher Souter made his will, by which he bequeathed all his real estate to his wife Elizabeth Souter, and his brother John Souter (the party who joined in the conveyance to Mr. Hull), upon trust to make an inventory thereof, and first, by sale of part, to pay his debts, &c., the residue to his wife for life, or while she continued his widow, and upon her death, or marriage, to his children, share and share alike. Whicher Souter died shortly after making this will, and in 1803 his widow married the lessor of the plaintiff, George Chatfield. Upon this case it was contended, that the lessors of the plaintiff were entitled to recover the premises, as devisees in trust under the will of Whicher Souter, the heir-at-law of Henry Souter, the original testator, and that the defendants must resort to their action against John Souter, the party to the conveyance to Mr. Hull, upon the deed. For the defendants three objections were taken. First, that as Whicher Souter was not in possession when he made his will, he could not devise a right of entry; second, that the realty did not pass under his will, the language of it being clearly referable to personal property only; and third, that as Mr. Hull had maintained an adverse possession for twenty-two years, and had died so adversely possessed, and had bequeathed the estate to his children, a descent was cast. The learned judge, however, was of opinion that the lessors of the plaintiff had shown a good title, and directed the jury to find a verdict for the plain-

tiff, reserving the points of law raised for the defendants, with liberty to them to move to enter a nonsuit, if the court should be of opinion that the objections were well founded.

Marryatt now moved accordingly.

ABBOTT, C. J. I am of opinion that there is no foundation for either of the objections presented for our consideration. With respect to the first, I think, there is no ground for saying, that the adverse possession of Mr. Hull has operated as a disseisin of Whicher Souter. Mr. Hull did not take possession wrongfully, he only wrongfully continued possession. He came in under right and title, which remained good during the life estate of Henry Souter's widow, but ceased at her death, and from that period he continued in possession wrongfully. But what is the effect of that? No more than that he is tenant by sufferance to Whicher Souter, who permitted him for a period to remain in possession. It has been held in a recent case in this court, that a mortgagor in actual possession of mortgaged premises is tenant by sufferance to the mortgagee, and this is a still stronger case than that. I know of no authority which says, that a mere wrongful possession divests the estate of the party against whom the possession is adversely held. If the argument is to be carried to that extent, a mere adverse possession might be made equivalent to a fine and feoffment. Then, as to the second objection, I am decidedly of opinion, that no descent has been cast in this case. To allow the argument on this point would be to allow, that wherever a wrongful possessor dies in possession, and his heir enters, the real heir-at-law cannot support ejectment. That would be a monstrous proposition generally, but especially in this case, where the heir-at-law was never disseised, and the defendants in the action were never seised at all. The language of "descent cast" imports that the ancestor is seised; and the question is begged, if it is assumed that in this case Hull, the ancestor of the defendants, was seised.

BAYLEY, J. I am of the same opinion. In order to bar the power of devising a right of entry, there must be an actual disseisin of the devisor; a mere adverse possession will not suffice; he must be completely ousted of the freehold. The question, then, is, whether Whicher Souter, the devisor under whose will the lessors of the plaintiff claim, was ever divested of the freehold; and I am of opinion that he never was. The relation of Mr. Hull to Whicher Souter is that of landlord and tenant; the former was tenant by sufferance to the latter from the moment of Mrs. Souter's decease. This point was laid down in this court in the recent case cited by My Lord, and is founded upon the doctrine in Lord Coke. Co. Lit. 240 b. The lessors of the plaintiff have shown a clear title in Whicher Souter, and if he had an estate in the premises, he was competent to devise it; he does devise it, and it vests in the lessors of the plaintiff as devisees in trust under his will. To support a descent cast, it must be shown that the ancestor was seised. Here, there was no seisin of Mr. Hull, the ancestor. In a case which I remember came from Warwick some time since, the counsel relied

upon a descent cast. It appeared in evidence that the party originally came into possession rightfully, and his possession was lawful, until a particular person died. After the death of that person, the party held over, and levied a fine, and when he died an ejectment was brought against his heir. On behalf of the heir it was insisted, that there had been a descent cast. No, said the court; for upon the death of the particular person alluded to, the ancestor became tenant by sufferance only; and therefore there could not be a descent cast, because there was no seisin. The definition which Lord Coke gives of a tenant by sufferance, is he who originally comes in by right, but continues in possession by wrong. Now, that is exactly the description of Mr. Hull, under whom the defendants claim, and therefore I think the lessors of the plaintiff are entitled to recover. It is said, that there has been an adverse possession for twenty-two years in this case. I know of no case in which it has been held, that a mere adverse possession (if this case is so put), can operate as a disseisin, to prevent the owner of the freehold from devising it by will. Mr. Hull was only a disseisor in one way, namely, at the election of Whicher Souter. There are many authorities which say, that this would only be a disseisin at the election of the owner of the freehold of inheritance; and if Whicher Souter had thought fit to treat it as a disseisin, he would be warranted in doing so; but he was not bound to do so. *Doe d. Atkyns v. Horde*, Cowp. 689. On these grounds, I am of opinion that the lessors of the plaintiff are entitled to recover.

HOLBOYD, J., and BEST, J., concurred.

*Rule refused.*¹

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DOE d. PARKER v. GREGORY.

KING'S BENCH. 1834.

[*Reported 2 A. & E. 14.*]

EJECTMENT for lands in Gloucestershire. On the trial before *Alderson*, B., at the last Gloucester Summer Assizes, the following facts were proved. Thomas Rogers, being seised in fee of the lands in question, devised them to his son Thomas Rogers for life, remainder to William Rogers in tail male, remainder to the devisor's right heirs in fee. The will gave a power to the tenant for life to settle a certain portion of the lands upon his wife for life, by way of jointure. After the death of the devisor, the son Thomas Rogers, being then tenant for life, settled the lands in question, being not more than the portion defined, upon his wife for life. He died in 1879, leaving his wife surviving, who afterwards married a person of the name of Vale. In 1810, Mr. and Mrs. Vale levied a fine of the lands to their own use in fee. In 1812, Mrs. Vale died, more than twenty years before the commencement of this

¹ See *Smith d. Teller v. Burtis*, 6 Johns. 197 (N. Y., 1810).

action. Mr. and Mrs. Vale had continued in possession of the lands until Mrs. Vale's death, and Mr. Vale from thenceforward continued in possession till his own death, which occurred in 1832. William Rogers died, leaving several children, all of whom died before Mrs. Vale; and of whom none left issue, except one daughter, who died one month before Mrs. Vale, leaving issue a son, who died without issue in 1814, within twenty years of the bringing of the action. The lessor of the plaintiff was heir at law to the deviser, Thomas Rogers. It did not appear how the defendant got into possession. On these facts, the learned judge nonsuited the plaintiff, on the ground that the right of entry was barred by the Statute of Limitations, but he reserved leave to move to set the nonsuit aside, and enter a verdict for the plaintiff.

Talfourd, Serjt., now moved accordingly.

PER CURIAM (LORD DENMAN, C. J., TAUNTON, PATTESON, and WILLIAMS, JJ.) The fine will make no difference; but, as to the question of the husband's adverse possession, we will take time to consider.

On a subsequent day LORD DENMAN, C. J., delivered the judgment of the court.

The other points moved by my Brother Talfourd were disposed of by the court, but we wished to consider whether he was entitled to a rule on the ground that there had been no adverse possession for twenty years. The fact was, that the defendant had been in possession for a longer period, from his wife's death, but he came in originally in her right, and had not directly ousted the rightful owner, but merely continued where he was, to his exclusion. A case of *Reading v. Rawsterne*, reported by Lord Raymond and Salkeld, 2 Ld. Raym. 830; s. c. 2 Salk. 423, was mentioned; but in that case, though an actual disseisin is declared necessary, those words must be taken with reference to the subject-matter, and are there contra-distinguished from the mere perception of rents and profits, in the case of joint-tenants. But in *Doe dem. Burrell v. Perkins*, 3 M. & S. 271, the court was of opinion that a fine levied by a person who was in possession under the same circumstances as the defendant here, operated nothing, because he came in by title, and had no freehold by disseisin; and it was argued, that the defendant here was also to be considered as having entered rightfully, and committed no disseisin. We are, however, of opinion, that though this may be so for the purpose of avoiding a fine, it cannot prevent the defendant's possession from being wrongful, from the very hour when his interest expired by his wife's death. It is clear that he might have been immediately turned out by ejectment. We think, therefore, that his continuing the same possession for twenty years entitles him to the protection of the Statute of Limitations, and that this action has been brought too late.

*Rule refused.*²

¹ See 2 Sm. L. C. (11th ed.) 652-655.

DOE d. GRAVES v. WELLS.

KING'S BENCH. 1839.

[Reported 10 A. & E. 427.]

EJECTMENT [against Wells and Trowbridge] for lands in Wiltshire. The several demises were alleged in the declaration to have been made on 17th October, 1836, *habendum* for seven years, from 15th October, 1836. After pleas pleaded, Wells compromised with the lessors of the plaintiff, but Trowbridge continued to defend. On the trial before *Patteson, J.*, at the Wiltshire Summer Assizes, 1837, it was proved, on the part of the plaintiff, that Graves, the lessor of the plaintiff, was entitled to the reversion upon a lease under which Trowbridge held, which lease was for ninety-nine years, to end in 1888, determinable on certain lives not yet expired, at a rent. It was further proved that, on 17th October, 1836, Graves's agent, in a conversation with Trowbridge, who was then in possession, demanded the rent of him, but Trowbridge then refused to pay it, and asserted that the fee was in himself. The counsel for the plaintiff contended that this was a disclaimer, working a forfeiture of Trowbridge's term; the defendant's counsel disputed this, and contended further that, even supposing this to be a forfeiture, the demise was laid too early, being on the very day of the supposed forfeiture. The learned judge directed the jury to find for the plaintiff, if they were of opinion that the words used by Trowbridge were not mere idle language, but a serious claim of the fee. The jury having found for the plaintiff, the learned judge reserved leave to the defendant's counsel to move to enter a verdict for the defendant. In Michaelmas Term, 1837, *Crowder* obtained a rule accordingly.

Erle and *Barstow*, now showed cause.

Crowder and *Butt*, contra.

LORD DENMAN, C. J. I think *Doe dem. Ellerbrock v. Flynn*, 1 Cr. M. & R. 187; s. c. 4 Tyrwh. 619, is distinguishable from the present case. There it was thought that the tenant had betrayed his landlord's interest by an act that might place him in a worse condition: if the case went farther than that, I should not think it maintainable. The other instances are cases either of disclaimer upon record, which admit of no doubt as to the nature of what is done, or of leases from year to year, in speaking of which the nature of the tenancy has been sometimes lost sight of, and the words "forfeiture" and "disclaimer" have been improperly applied. It may be fairly said, when a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, that evidence of a disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy, from its particular nature, was limited. But no case, I think, goes so far as the present; and I

feel the danger of allowing an interest in law to be put an end to by mere words.

LITLEDALE, J. We should not, indeed, be justified in putting an end to a state of law on account of its danger; for we must give parties whatever the law entitles them to: but here the law leads to no such consequence. The case is not like that of a tenancy from year to year, which lasts only as long as the parties please, and where what has been called a disclaimer is evidence of the cessation of the will. Here property is claimed on the ground of forfeiture. Now, assume the jury to have been right in their verdict: still the facts do not go far enough for a forfeiture. In Comyns's Digest, tit. Forfeiture, and in Viner's Abridgment, tit. Estate (see 10 Vin. Abr. 370, sqq. Forfeiture (C. b), &c.), a very great number of instances of forfeiture are given: but there is no allusion to any case of this kind; the instances are either of matters of record, or of acts *in pais* quite different from what is here insisted upon. In an *Anonymous Case* in Godbolt, 105, pl. 124, the tenant claimed the fee on the record, in an action of debt; and yet it was held to be no forfeiture. *Doe dem. Ellerbrock v. Flynn* has been satisfactorily distinguished by My Lord.

PATTESON, J. No case has been cited where a lease for a definite term has been forfeited by mere words. We know that mere words cannot work a disseisin, although some acts have been held to work a disseisin at the election of the party disseised, which, as against him, would not work a disseisin. An attornment again is an act. Here there is no act; and, if we held that there was a forfeiture, we should be going much beyond any previous decision. It is sometimes said that a tenancy from year to year is forfeited by disclaimer: but it would be more correct to say that a disclaimer furnishes evidence in answer to the disclaiming party's assertion that he has had no notice to quit; inasmuch as it would be idle to prove such a notice where the tenant has asserted that there is no longer any tenancy.

WILLIAMS, J., concurred.

*Rule absolute.*¹

¹ So, *accord*, *De Lancey v. Ganong*, 9 N. Y. 9 (1853).

"Till within a comparatively recent period, it was considered that a tenant could not, in any sense, repudiate his tenancy, even where it existed by parol merely, or from year to year; or that he could not do this without surrendering or abandoning the premises. But it is now settled otherwise in this State, and in the United States Supreme Court. The tenant, by distinct notice to his landlord that he will no longer hold the premises under him, has been regarded here as committing an absolute disseisin, and after that, as holding adverse to the landlord, and unless evicted before the term of the Statute of Limitations expires, he will, by such adverse possession, acquire title in his own right. In *Willison v. Watkins*, 3 Peters U. S. 48, Mr. Justice Baldwin says: 'Had there been a formal lease for a term not then expired, the lessee forfeited it by this act of hostility; had it been a lease at will, from year to year, he was entitled to no notice to quit before an ejectment. The landlord's action would be as against a trespasser, as much so as if no relation had ever existed between them.' This case was professedly followed in two cases in this State: *Greene v. Munson*, 9 Vt. 37; *Hall v. Dewey*, 10 Vt. 593; and has been recognized in many others. It is undoubtedly a new doctrine, and adopted here from a regard to the difference in our land tenures,

DALTON v. FITZGERALD.

CHANCERY DIVISION. 1897.

[Reported L. R. [1897] 1 Ch. 440.]

THIS was an action to establish the plaintiff's title to certain lands and hereditaments situate in the township of Bulk, in the county of Lancaster, which formerly formed part of the Bulk estate of Mr. John Dalton, who died on March 10, 1837. Mr. Dalton was, at the time of making his will and codicils hereafter stated and at the date of his death, entitled to real estate of very considerable value, and in particular to (1.) the manor of Thurnham, and divers lands and hereditaments in Thurnham, Glasson, Cockerham, Pilling, and Ellel, in Lancaster, hereinafter called the Thurnham estate; and (2.) the manor of Bulk and divers lands and hereditaments in the township of Bulk, hereinafter called the Bulk estate. Both these estates were old family estates acquired by an ancestor of John Dalton in the reign of William and Mary. Mr. Dalton had issue several daughters and one son, who bore the same name as himself. This son in 1809 married Miss Mary Ann Cary, and in contemplation of the marriage a settlement was made by deeds of lease and release dated January 30 and 31, 1809, whereby the Thurnham estate (but not the Bulk estate) was limited to uses which were in substance in favour of John Dalton, the father, for life, with remainder to John Dalton, the son, for life, with remainder to the first and other sons of John Dalton, the son, successively in tail male, with an ultimate remainder in favour of the right heirs of John Dalton, the father, subject, however, to a jointure in favour of the widow of John Dalton, the son, and to a power to charge the estate for the benefit of his younger children. John Dalton, the son, died in 1819 without having had any children, and consequently the limitations contained in the marriage settlement subsequent to the life of John Dalton, the father, with the exception of the ultimate remainder to his right heirs, failed, and the only effect of this settlement was to provide a jointure for the widow of the son. In this state of things, John Dalton, the father, made his will, dated January 25, 1828.

At that time the only children of the testator living were two daughters — Lucy, the wife of Joseph Bushell, and Elizabeth Dalton, who was unmarried. The will contained a recital of the settlement of 1809, commencing as follows: "Whereas by the said settlement of my family estates, consisting of the manors of Thurnham and Glasson and of Bulk" — and so forth — "were settled." That was erroneous in so far as it mentioned the manor of Bulk, because the manor of Bulk was

and in our civil and social relations and institutions in many respects, from those in England." — *Per* REDFIELD, C. J., in *Sherman v. Champlain Transp. Co.*, 81 Vt. 162, 177 (1858). See 2 Tayl. Landl. and Ten., (9th ed.) § 522.

not included in the settlement of 1809. The will then proceeded as follows: "And whereas my said son some time ago departed this life leaving no issue of the said marriage and I am desirous that the said estates which have descended to me from my ancestors should be preserved as one entire patrimony and should be enjoyed by my two daughters equally between them for life, and by the survivor of them for her life, and their respective issue male as hereinafter mentioned, and that in default of such issue male the same estates should still be kept undivided and be enjoyed in the order of succession hereinafter pointed out, so that they may always form the estate of one person bearing my name and arms in order to continue the name and memory of my family for many years, if it shall so please God, for these reasons I give and devise all those the manors and lordships of Thurnham and Glasson and of Bulk and all other the messuages, tenements, lands, tythes, fisheries, hereditaments and premises whatsoever situate in Thurnham, Glasson, Bulk, Cockerham, Pilling, and Ellet in the county of Lancaster or elsewhere soever, and which are comprised in the settlement so made previous to the marriage of my said late son or mentioned, or intended so to be, with the appurtenances unto and to the use of" two trustees, their heirs and assigns, upon trust to settle, convey, and assure the same manors, messuages, lands, tenements, hereditaments and premises to the uses and in the manner therein mentioned.

The testator then defined the limitations upon which his estates were to be settled, and directed his trustees to insert in the settlement all proper and usual clauses for effectuating his intention as counsel should advise; and he also gave special directions as to the insertion of certain usual powers, which he enumerated, including powers of jointuring and charging portions.

The testator made several codicils to his will, in which he referred to the estates devised by his will as "my family estates," "my real estate," "the remainder of my real estate," "my residuary real estates," and "my manors or lordships and estates at Thurnham and Glasson and Bulk."

At the date of the testator's death in 1837 his two daughters named in the will were his co-heiresses-at-law.

By an indenture of settlement dated July 30, 1842, which purported to be a settlement in pursuance of the will and codicils of the testator, after reciting the settlement of 1809 and the will and codicils, it was witnessed that, "for effecting the settlement directed to be made by the said John Dalton the elder as aforesaid," the trustees, with the privity of (among others) Mrs. Bushell and Miss Elizabeth Dalton, bargained, sold, and released unto Richard Gillow, his heirs and assigns, the Thurnham estate and the manor of Bulk, "and all and singular the messuages, mills, lands, tenements, and hereditaments late of John Dalton the elder, situate, lying, and being in Bulk aforesaid" (the same being more particularly described in a schedule

thereto), to uses in favour of the testator's daughters and their issue, with remainder to the use of Sir James Fitzgerald (then an infant) for his life, with remainder to his first and other sons successively in tail male, with remainder to Gerald Fitzgerald (then an infant) for life, with remainder to his first and other sons successively in tail male, with remainder (after certain remainders which failed) to the plaintiff for life, with divers remainders over.

The uses and limitations in the settlement followed the directions of the testator, subject to the question whether or not the lands in Bulk passed under his testamentary dispositions.

The testator's daughters were made parties to the deed and executed it; but the deed was never acknowledged by Mrs. Bushell, and neither Mrs. Bushell nor Miss Dalton purported to grant the property comprised therein. The other tenants for life were named as parties to the deed, but neither Sir James Fitzgerald nor Gerald Fitzgerald ever executed it.

Mrs. Bushell died in 1843 without having had issue and intestate, and her sister Elizabeth was her heiress-at-law, and became, by the death of Mrs. Bushell, sole heiress-at-law of the testator. Elizabeth Dalton died in 1861 without having been married; and thereupon Sir James Fitzgerald entered into possession and receipt of the rents and profits of all the estates comprised in the settlement of 1842. He died without issue in 1867. Thereupon Sir Gerald Fitzgerald entered into possession and receipt of the rents and profits of the same estates. He died on February 22, 1894, without issue; and thereupon the plaintiff became entitled, according to the limitations of the settlement of 1842, to possession of the estates therein comprised. It was discovered, however, on Sir Gerald Fitzgerald's death, that in January, 1894, he had procured himself to be registered in the land registry as proprietor of the fee simple of certain of the lands in Bulk comprised in the settlement, and had by a codicil to his will devised those lands to the defendants. Thereupon the defendants entered into possession, and the present action was brought, claiming (*inter alia*) a declaration that the lands in question were effectually comprised in the settlement of 1842; that the title of the plaintiff as tenant for life of the lands under the settlement might be established, delivery of possession of the lands to the plaintiff, and an order for the rectification of the register of title at the office of the land registry. The defendants asserted that John Dalton the father died intestate as to all lands in Bulk except such as were included in the settlement of 1809; that the manor of Bulk was only a reputed manor, that the devise of that manor would not pass the lands in question, and that the testator had not by his will and codicils used any language adequate to pass them; that the settlement of 1842 was altogether ineffectual, and that Sir Gerald Fitzgerald by his possession of these lands for more than twenty years had acquired a title to them in fee simple. The plaintiff, on the other hand, asserted that the manor of Bulk was an actual and not a reputed manor, and that a

devise of the manor was effectual to pass the lands in question; that if not, still, on the true construction of the will, these lands were comprised in the devise to the trustees therein contained; and, finally, that even if all these points were decided against the plaintiff, Sir Gerald Fitzgerald and the defendants who claimed under him were estopped from disputing the validity of the settlement of 1842; and for this purpose evidence was adduced to shew that prior to January, 1894, Sir Gerald Fitzgerald had treated the lands in Bulk now in question as having been properly settled by the settlement of 1842. For example, the succession duty account which he passed on succeeding to the family estates was rendered as an account on the succession of real estate derived from John Dalton, Esq., the predecessor, under the will of the said John Dalton, and under a settlement made in pursuance of the will of the said John Dalton, dated July 30, 1842, and included the lands in Bulk; and by an indenture of September 9, 1868, which commenced by reciting the settlement of 1842, and expressly recited that the lands in Bulk were thereby settled to certain uses, which were there set out, with certain powers of jointuring and charging portions, he, in the exercise of the powers conferred by the thereinbefore recited indenture, charged the settled estates with a jointure for his widow and portions for his younger children.

STIRLING J., after stating the facts substantially as above set out, continued as follows:—For the purpose of the present judgment I assume in favour of the defendants that on the true construction of the will and codicils of John Dalton, the father, the lands and hereditaments in Bulk, to which I shall hereafter refer as the lands in Bulk, which are now claimed by the defendants, did not pass by his will and codicils, but on the death of the testator devolved to his co-heiresses-at-law. By the deed of July 30, 1842, to which those co-heiresses were parties, the trustees of the will with their privity purported to bargain, sell, or release these lands in Bulk by a sufficient description to legal uses in favour of the same persons as would have been entitled to have legal uses created in their favour if these lands in Bulk had passed by the will and codicils of John Dalton. Now of this deed Sir Gerald Fitzgerald took the benefit in respect of these very lands in Bulk. This appears to me to be established, first, by the succession duty account passed by him, and, secondly, by the jointure deed executed by him, and dated September 9, 1868. [His Lordship referred to those documents, and continued:—]

Upon this evidence I come to the conclusion of fact that Sir Gerald Fitzgerald entered into possession of the lands in Bulk under the settlement of 1842. The question is whether, having so done, he is not estopped from denying the validity of that deed.

Similar questions have repeatedly arisen under wills. Those cases appear to divide themselves into two classes. The first is, where a testator having either no title or an imperfect title to land devises it by specific description to or upon trust for a person for life with re-

mainders over. Examples of this class are to be found in *Hawksbee v. Hawksbee*, 11 Hare, 230, and *Board v. Board*, L. R. 9 Q. B. 48. I refer particularly to the latter case, as the judgment is more elaborate and expresses the grounds of decision more fully than in *Hawksbee v. Hawksbee*, 11 Hare, 230. In *Board v. Board*, L. R. 9 Q. B. 48 the testator was simply tenant by the curtesy of certain premises. He devised them to trustees for his daughter Rebecca for life, with remainder to his grandson William. Then, upon the testator's death, Rebecca entered into possession of the property, and paid the annuities charged upon the land, and was suffered by the heir-at-law to remain in possession undisturbed for more than twenty years. Then William conveyed his remainder to the plaintiff. Rebecca, after she had been in possession more than twenty years, conveyed the premises in fee to the defendant, who, upon his [her] death, took possession. The plaintiff, the assignee of William, the remainderman, having brought ejectment, it was held that, Rebecca having entered under the will, the defendant claiming through her was estopped as against all those in remainder from disputing the validity of the will, and that the plaintiff was entitled to recover. In giving judgment Blackburn J. says, L. R. 9 Q. B. 53: "The case is like that of a tenant coming in under a landlord: he is estopped from denying his landlord's title. As to the point that Robert, being only a tenant by the curtesy, had nothing to devise, it may be said that in many instances the landlord has only an equitable title, and yet the tenant is estopped from disputing such title. I think if the law were otherwise the consequences would be disastrous, for how unjust it would be if a person who comes in under a will as tenant for life, and continues in possession until twenty years have elapsed, could say there was a latent defect in the title of his predecessor, and the estate devised really belonged to the heir-at-law, and his title being barred, he, the tenant for life, is entitled to the property in fee simple. It is contrary to the law of estoppel that he who has obtained possession under and in furtherance of the title of a deviser should say that such title is defective. My brother Martin, in *Anstee v. Nelms*, 1 H. & N. 232; 26 L. J. (Ex.) 8 says that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter and then say that such possession was unlawful, so as to give to his heir a right against a remainderman. That seems directly in point. It is good sense and good law. All we have to decide here is that Rebecca, having entered under the will, William, the remainderman under the same will, has a right to say that she and all those claiming through her are estopped from denying that the will was valid." Mellor J. says: "A person cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will." Quain J. says: "I decide this case on the simple point that a person who takes under a will, and acts on the will in paying the legacies and annuities given under it,

cannot afterwards turn round and place himself in a different position, and maintain that he is in a position adversely to those who take under the same will."

No doubt has ever been thrown upon that class of cases; but there is a second class as to which there is a conflict of opinion, namely, where a testator, having a good title to property, has not effectually devised it, and the tenant for life of the property effectually devised by the will has entered, just as if it had been included in a valid devise, and acquired by possession a title against the heir. The case which has most frequently happened is under the law as it stood prior to the Wills Act, when a testator was incompetent to devise land acquired subsequently to his will. Of this class of cases *Paine v. Jones*, L. R. 18 Eq. 320, is a leading example. There a testator by his will, dated in 1824, devised all his real and personal estate, and also all other his estate and effects of which he might be possessed at the time of his decease, to his wife and another trustee, in trust to pay the rents to his wife for life, with remainders over. The testator purchased a freehold estate after the date of his will. On his death his widow (the other trustee having disclaimed) became sole trustee of his will, and entered into possession of the after-acquired property as well as the devised estate, believing that all the property passed by the will. She continued in possession for more than twenty years, and then, being informed that she had acquired a title by adverse possession, she sold the estate to a purchaser for value. It was held, upon a bill filed by the remainderman under the will to oust the purchaser, that the tenant for life had acquired a good title by adverse possession against the remainderman, and the bill was dismissed. Malins, V.-C., who decided the case, goes through all the prior cases, including *Board v. Board*, L. R. 9 Q. B. 48, and *Hawksbee v. Hawksbee*, 11 Hare, 230, and he expresses his concurrence with those cases, but he distinguishes them. Referring to them, he says, L. R. 18 Eq. 328: "All these cases proceed on the principle that if parties have no other title than the will, they are estopped from denying the title of persons under the same will. Under this will the widow had no title whatever. The defendants had a title under the will." That is apparently a misprint for "widow." The Vice-Chancellor then goes on: "I think this is a distinct case of adverse possession, and the defendants claiming under the widow have acquired a title as against those persons whose title is only under the will." In a subsequent case of *In re Stringer's Estate*, 6 Ch. D. 1, Sir George Jessel held that if a testator made an invalid devise of property, to which he himself had a good title, to A. for life with remainders over, and A. acquired a good title by possession against the heir-at-law, A. was not estopped from saying, as against the remainderman, that the devise was invalid. Upon appeal the devise which the late Master of the Rolls had held to be invalid was held to be valid, and no opinion was expressed on the decision of the Master of the Rolls on the point in question; but it appears to me

that when his judgment is examined the Master of the Rolls did not intend to throw any doubt upon the class of cases of which *Board v. Board*, L. R. 9 Q. B. 48, is an example. At page 10 of the report he says: "A man is in possession of land with a defective title, but he has possession. In fact, under the old law, he could not have devised without, except in the case of certain reversions. He devises to a man for life with remainder over. The devisee, having no title except under the will, enters under the will. It has been held that he cannot deny that the testator had a right to devise in the way he has devised; that is, that the testator had a sufficient title to support the devise as far as the devisee is concerned—not to make the devises valid which were invalid, because the devises were invalid per se if the testator had insufficient title. Therefore the whole of the estoppel is this: you have entered under the will of a man who had possession as far as you are concerned: possession is the fee: you cannot say, you having no title, that he had less than the fee which he purported to devise. You are estopped from denying his title to dispose of that fee, though you may have found out afterwards that he was only tenant for years, or tenant from year to year, or tenant for life, or anything else. You have got possession under that will, and possession in law, as far as you are concerned, of the fee. All that I understand. That is a little extension of the doctrine of estoppel by contract, but it follows on the same principle." On the other hand, in *Anstee v. Nelms*, 1 H. & N. 230, 232, Pollock C.B. and Martin B. appear to have been of opinion that the principle laid down in *Board v. Board*, L. R. 9 Q. B. 48, was applicable to a case similar to that of *Paine v. Jones*, L. R. 18 Eq. 320, and in the case of *Kernaghan v. M'Nally*, 12 Ir. Ch. Rep. 89, the Lord Chancellor and the Court of Appeal in Ireland appear to have given a decision which was not in accordance with that of Malins V.-C.

It is contended that the present case is governed by the decisions in *Paine v. Jones*, L. R. 18 Eq. 320, and *In re Stringer's Estate*, 6 Ch. D. 1. In my judgment that is not so. The question is not whether Sir Gerald Fitzgerald is estopped from denying that John Dalton devised the lands in Bulk, but whether he is estopped from denying the validity of the settlement of July 30, 1842. It appears to me that the reasoning in *Board v. Board*, L. R. 9 Q. B. 48, applies with as much force to a deed as to a will, and I see no reason why, if a grantor who has no title or an imperfect title to a particular piece of land purports to grant it by deed to A. for life with remainders over, and A. enters under the deed and acquires a good title against the true owner, he should not be held to be estopped as against those in remainder from disputing the validity of the deed. It is to be observed that in this case the true owners were parties to and executed the deed, and though they did not grant, or purport to grant, the lands in Bulk, still they, by executing the deed, assented to the act of the trustees, and shewed that they treated the deed as a proper settlement in pursuance of the directions in the testator's will.

It was said, however, that there could be no estoppel, as the truth appeared on the face of the settlement of July 30, 1842. But, in my judgment, it does not appear on the face of that deed either that the manor of Bulk was only a reputed manor, so that the lands in Bulk belonging to the testator did not pass under a devise of that manor, or that upon the true construction of the testator's will there was an intestacy as regards the lands in Bulk. It is also urged that the settlement of July 30, 1842, was only machinery for giving effect to the dispositions made by the testator, and gave no further or better title than the will itself. This seems to me to give too little weight to the deed, which confers a legal title on the beneficiaries under the will, and defines many rights conferred upon them by the will and codicils (as, for example, that of creating jointures and charging portions for younger children), of which the beneficiaries have availed themselves. The conclusion, therefore, to which I come is that the doctrine of estoppel applies to this case, and that the defendants are precluded from denying that the deed of 1842 was an effectual settlement, and consequently that the plaintiff is entitled to judgment.¹

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FRENCH v. PEARCE.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1831.

[Reported 8 Conn. 439.]

THIS was an action of trespass *quare clausum fregit*; tried at Litchfield, February Term, 1831, before *Williams, J.*

The plaintiff and defendant were adjoining proprietors of land; and the land in controversy was the border between them, which was woodland, unfenced. Both parties claimed under William French, the father of the plaintiff and of the defendant's wife. The plaintiff's title was admitted, unless the land was conveyed to the defendant's wife, by a deed dated the 11th of May, 1809; in which the line on the side adjoining the plaintiff was particularly described. A part of the description was "from a butternut-tree a straight line to Platt's corner — said piece being the same land which the grantor bought of Rev. Mr. Benedict." The defendant contended, that as the deed to his wife referred to the land purchased of Mr. Benedict, he might show where were the bounds of that lot; and claimed, that by those bounds, there was not a straight line from the butternut-tree to Platt's corner. This was accompanied with evidence, by which he claimed to have shown, that he had occupied and possessed the land in question for more than fifteen years, although not included in the straight line mentioned in the deed. The plaintiff denied the occupation of the defendant; and

¹ Cf. *In re Anderson* L. R. [1905], 2 Ch. 70.

denied also any difference in bounds in consequence of the reference to Mr. Benedict's deed, and any adverse possession by the defendant.

The judge charged the jury, that in considering where were the boundaries of this lot of the defendant's wife, if the description in the deed was doubtful, they might take into consideration the possession or occupation of the defendant, for the purpose of determining those bounds. But if they should find, that the defendant had possessed the land in question for more than fifteen years, claiming and intending only to occupy to the true line, as described in his deed and no further, then his possession must be referred to his deed, and it would not be adverse to the plaintiff; and the jury, notwithstanding such possession, must look to the deed, to determine the line of division.

The jury returned a verdict for the plaintiff; and the defendant moved for a new trial for a misdirection.

J. W. Huntington and J. Strong, in support of the motion.

Bacon, contra.

HOSMER, C. J. Whether the line of occupancy was the dividing line between the parties, was the point of controversy between them. The jury were charged, so far as relates to the deed, that if the line described in it was doubtful, they might take into consideration the possession and occupation of the defendant, for the purpose of determining it. This opinion seems not to be questioned; nor is it questionable. An occupation of land, by the defendant as his own, under the plaintiff's eye, to what he supposed to be the dividing line between him and the plaintiff, and which, for many years, the plaintiff permitted without a question, from the mutual assent of the parties, is strong presumptive evidence of the true place of the line. 1 Phill. Ev. 420-22.

On the point of title by fifteen years' possession, as the only objection made at the trial, was, that the possession of the defendant was not adverse, it must be assumed, that none other existed. Of consequence, the controversy is confined to that single point.

By "adverse possession" is meant a possession hostile to the title of another, or, in other words, a disseisin of the premises; and by "disseisin" is understood an unwarrantable entry, putting the true owner out of his seisin. Co. Lit. 153 b, 181.

The inquiry, then, is precisely this: What must be the character of the act, which constitutes an adverse possession?

This question was directly answered, in *Bryan v. Atwater*, 5 Day, 181, and by this court. A clear and unquestionable rule was intended to be given. The court commenced the expression of their opinion, by saying: "It will be necessary to ascertain *precisely* the meaning of the terms *adverse holding* or *adverse possession*." The first principle asserted in that case is, that to render a possession *adverse*, it is not necessary that it should be accompanied with a claim of title and with the denial of the opposing title. The case next affirms that possession is never adverse, if it be under the legal proprietor and derived from him. After these preliminaries, it is inquired: "But more particularly,

what, in point of law, is an adverse possession? It is," say the court, "a possession, *not under the legal proprietor, but entered into without his consent, either directly or indirectly given.* It is a possession, by which he is disseised and ousted of the lands so possessed." That there should remain no doubt, they next inquire, What constitutes a disseisin? After showing negatively that it is not requisite to enter claiming title, or denying the title of the legal owner, they remark affirmatively, that it is only necessary for a person to enter and take possession of land *as his own*; to take the rents and profits to himself; and to manage with the property as an owner manages with his own property: that is, the person thus possessing must act as if he were the true owner and accountable to no person for the land or its avails. A criterion is then given to determine whether a possession is adverse. "It is only necessary to find out," say the court, "whether it can be considered *as the constructive possession of the legal proprietor.*"

I have been thus particular in analyzing this case, in which the reasons were drawn up by a very able and eminent jurist; as it presents, in the plainest language, a sure and most intelligible landmark, to ascertain when a possession is adverse. It is peculiarly observable, that by the reasons given, anxiously labored as they were, it was intended to put the question at rest for the future. The possession alone, and the qualities immediately attached to it, are regarded. No intimation is there as to the *motive* of the possessor. If he intends a wrongful disseisin, his actual possession for fifteen years gives him a title; or if he occupies what he believes to be his own, a similar possession gives him a title. Into the recesses of his mind, his motives or purposes, his guilt or innocence, no inquiry is made. It is for this obvious reason: that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor.

It is not necessary that I should proceed further, as the point of decision, in the case before us, has been settled, by this court, and with great precision. At the same time, it may be the more satisfactory to show, that the determination here is in harmony with the decisions of other courts.

In Westminster Hall, the character of an adverse possession is well established. The possession of a person denying the title of the owner, or claiming the premises, or taking the whole rents and profits without accounting, is held sufficient evidence of actual ouster. *Doe d. Fisher et al. v. Prosser*, Cowp. 217; *Doe d. Hellings et Ux. v. Bird*, 11 East, 49; *Stocker v. Berny*, 1 Ld. Raym. 741; s. c. by the name of *Stokes v. Berry*, 2 Salk. 421. The extent of the doctrine is defined by the following considerations. The possession of a tenant in common is held not to be adverse, without actual disseisin or its equivalent, as he is presumed to possess for his fellow commoner; but the possession of an individual entering not under another, is adverse, by a perception of the profits only to his own use.

In the State of New York the entering on land under *pretence* of title, or under a claim *hostile* to the title of the true owner, constitutes an adverse possession. *Brandt d. Walton v. Ogden*, 1 Johns. Rep. 156; *Jackson d. Griswold v. Bard*, 5 Johns. Rep. 230; *Jackson d. Bonnell et al. v. Sharp*, 9 Johns. Rep. 162.

To the same effect is the law of Massachusetts. "To constitute an actual ouster," said Parsons, C. J., "of him who was seised, the disseisor must have the actual exclusive occupation of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession." *Kennebeck Purchase v. Springer*, 4 Mass. Rep. 416, 418; *Boston Mill Corporation v. Bulfinch*, 6 Mass. Rep. 229. It is obvious, that a person who takes possession, does not the less claim to hold it against him who before was seised, because he conscientiously believes, that he has right to possess.

The law of Maine, so far as it is expressed in the case of *Kennebeck Purchase v. Laboree et al.*, 2 Greenl. 275, is in perfect harmony with that of the States already mentioned. "The doctrine on this subject," said Mellen, C. J., "seems to be plain and well settled. A possession must be adverse to the true owner, in order to constitute a disseisin. The possessor must claim to hold and improve the land *for his own use*, and exclusive of others." He next states, that in a count on the demandant's seisin, it was never incumbent on the tenant to prove more than his continued possession and occupancy for thirty years next before the commencement of the action, *using and improving the premises after the manner of the owner of the fee*; and he then subjoins, that such possession, unless explained, affords satisfactory evidence to the jury, that such tenant claimed to hold the land as his own.

In the case of *Brown v. Gay*, 3 Greenl. 126, the question was, whether the tenant was in possession of certain land by disseisin. He owned a lot denominated No. 3, and was in possession of lot No. 4, claiming that it was part of the former lot. He was, therefore, in possession through mistake. This principle was advanced, by the court, to wit: "If the owner of a parcel of land, through inadvertency or ignorance of the dividing line, includes a part of an adjoining tract within his enclosure, this does not operate a disseisin, so as to prevent the true owner from conveying or passing the same by deed."

If the learned court meant to lay down the position, that although the possession was adverse and a disseisin, yet that it was of such a character as not to prevent the owner from transferring the land by deed, the case has no bearing on the one before us. But if it was intended to declare, that there was no disseisin at all, by reason of the before-mentioned mistake, I cannot accede to the proposition. There was a possession; it was not under the true owner, but it was under a claim of right; and the rents and profits (if any) were received and appropriated to the possessor's use, without any supposed or assumed accountability. This is a disseisin, by all the cases on the subject, with

every mark or *indicium* of one upon its face. If the possession were incidental to the taking of something off the property, it would be a trespass only. But when the possession is a permanent object, under a claim of right, however mistaken, what can be a disseisin, if this is not? That the possessor meant no wrong, might be very important, if he were prosecuted for a crime; for *nemo fit reus, nisi mens sit rea*. But the motive, which induced the taking possession, is remotely distant from the possession in fact under a claim of right, and in no respect tends to qualify or give character to the act. It was adverse possession and disseisin (innocently happening) with the full intention of the mind to possess exclusively; and by necessary consequence, a seclusion of the owner from the seisin of his property.

I agree with the learned court, that the intention of the possessor to claim adversely, is an essential ingredient. But the person who enters on land believing and claiming it to be his own, does thus enter and possess. The very nature of the act is an assertion of his own title, and the denial of the title of all others. It matters not, that the possessor was mistaken, and had he been better informed, would not have entered on the land. This bears on another subject, — the moral nature of the action; but it does not point to the inquiry of adverse possession. Of what consequence is it to the person disseised, that the disseisor is an honest man? His property is held, by another, under a claim of right; and he is subjected to the same privation, as if the entry were made with full knowledge of its being unjustifiable.

In the case of *Ross v. Gould*, 5 Greenl. 204, it is said, "A disseisin cannot be committed by mistake, because the intention of the possessor to claim adversely, is an essential ingredient in disseisin." I do not admit the principle. It is as certain that a disseisin may be committed by mistake, as that a man may by mistake take possession of land, claiming title and believing it to be his own. The possession is not the less adverse, because the person possessed intentionally, though innocently. But in the moral nature of the act, there is undoubtedly a difference, when the possessor knowingly enters by wrong.

I have been the more particular in my observations, for two reasons. The first is, that the evidence of adverse possession, which is of very frequent occurrence, might be placed on grounds clear and stable; the next, from a serious apprehension that in the law of disseisin an important change is inadvertently attempted. Adopt the rule, that an entry and possession under a claim of right, if through mistake, does not constitute an adverse possession, and a new principle is substituted. The inquiry no longer is, whether visible possession, with the intent to possess, under a claim of right, and to use and enjoy as one's own, is a disseisin; but from this plain and easy standard of proof we are to depart, and the invisible motives of the mind are to be explored; and the inquiry is to be had whether the possessor of land acted in conformity with his best knowledge and belief.

In the case before us, the plaintiff adduced evidence to show, that he

entered on the land in question, and possessed it more than fifteen years, uninterruptedly and exclusively, under a claim and belief of right, and appropriating to his own use, without account, all the rents and profits. This was adverse possession and disseisin, and gave him title under the law of the State.

Upon this principle, the charge was incorrect, and a new trial is advised.

The other judges were of the same opinion, except PETERS, J., who was absent.

New trial to be granted.

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SUMNER v. STEVENS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1848.

[Reported 6 Met. 387.]

WRIT OF ENTRY. The demandant claimed title to the demanded premises under a deed of warranty from Stephen Stevens, her father, who was also father of the tenant. At the trial, before *Wilde, J.*, the tenant rested his defence upon a title by disseisin of said Stephen, and offered evidence tending to show, that more than 20 years before the date of the demandant's writ, and before said Stephen's deed to the demandant, said Stephen made a gift to him, by parol, of the demanded premises, and that he afterwards went into possession thereof, and continued in exclusive possession upwards of 20 years.

Upon this evidence, the jury were instructed, that if they believed it, and also believed that the tenant entered and continued his possession, *claiming title*, this would constitute a title by disseisin, and that they should return a verdict for the tenant. The jury found a verdict for the tenant, which is to be set aside, if the foregoing instruction was incorrect.

Sumner and Byington, for the demandant.

Porter, for the tenant.

SHAW, C. J. The case shows that the tenant entered, more than twenty years before the commencement of this action, under a parol gift from his father, and has had the sole and exclusive possession ever since. Had the tenant simply shown an adverse and exclusive possession twenty years, he would have shown that the owner had no right of entry, and that would have been a good defence to this action. Is it less so, that the tenant entered under color of title? A grant, sale or gift of land by parol is void by the Statute. But when accompanied by an actual entry and possession, it manifests the intent of the donee to enter and take as owner, and not as tenant; and it equally proves an admission on the part of the donor, that the possession is so taken. Such a possession is adverse. It would be the same if the grantee should enter under a deed not executed conformably to the

Statute, but which the parties, by mistake, believe good. The possession of such grantee or donee cannot, in strictness, be said to be held in subordination to the title of the legal owner; but the possession is taken by the donee, as owner, and because he claims to be owner; and the grantor or donor admits that he is owner, and yields the possession because he is owner. He may reclaim and reassert his title, because he has not conveyed his estate according to law, and thus regain the possession; but until he does this, by entry or action, the possession is adverse. Such adverse possession, continued twenty years, takes away the owner's right of entry. *Barker v. Salmon*, 2 Met. 32; *Parker v. Proprietors of Locks and Canals*, 3 Met. 91; *Brown v. King*, 5 Met. 178; *Clapp v. Bromagham*, 9 Cow. 530. We have not used the term "disseised," because the accurate definition and description of disseisin has been the subject of much discussion. The term is somewhat equivocal, and the same facts may prove a disseisin, for some purposes and in some aspects, and not in others. It is enough for the decision of this case, that the tenant had the actual, exclusive and adverse possession of the estate more than twenty years, by which the owner, and all persons claiming under him, were barred of their entry and right of action. Rev. Sts. c. 119, § 1.

*Judgment on the verdict.*¹

GRUBE v. WELLS.

SUPREME COURT OF IOWA. 1871.

[Reported 34 Iowa, 148.]

APPEAL from Des Moines District Court.

Action to recover the possession of a part of lot 260, in the northern addition to the city of Burlington, being a strip of about the width of fifteen feet, of the south end of said lot. Trial to the court without a jury, and judgment for plaintiff. Defendant appeals.

Halls and Baldwin, for the appellant.

No appearance for the appellee.

BECK, C. J. The District Court found the following facts, and thereon rendered judgment for plaintiff: The plaintiff is the owner of lot 260, in the northern addition to the city of Burlington, and the defendant owns lot 1, in Wood's subdivision, which adjoins plaintiff's lot on the south. About twenty-five years ago defendant's grantor enclosed lot 1, and made other improvements upon it. The fence on the north was set about fifteen feet over the line upon lot 260, which was unenclosed, and remained in that condition until within the last four or five years. Defendant and her grantor have had actual possession and exercised rights of ownership over the strip of land in controversy since it was enclosed,

¹ But see *Clarke v. McClure*, 10 Gratt. 305 (Va., 1853).

but have never had any other right or color of title than such as result from the possession stated. They have held the land under the belief that it was covered by the deeds conveying to them lot 1, and were not informed otherwise until within about one year, when, upon an accurate survey, the true line was established. There is no dispute about the other boundaries of lot 1, and defendant's title and possession to the whole of it have never been questioned. Defendant has paid taxes continuously on lot 1, and plaintiff on lot 260.

The question presented by the foregoing facts, as found by the District Court for determination, is this: Is defendant protected in her possession of the land in dispute by the Statute of Limitation?

I. The Statute of Limitation is not available as a defence, unless the defendant holds the land under color of title, or has had actual adverse possession for the full time limited by the Statute for the commencement of the action. *Right v. Keithler*, 7 Iowa, 92; *Jones v. Hockman*, 12 Id. 101; s. c. 16 Id. 487. It is not claimed that in the case before us defendant holds color of title to the land, but recovery is resisted on the ground that she and her grantor have been in the adverse possession of the property for the time which, under the Statute, will bar the action. We are required to determine whether the possession relied upon is of that character which is deemed by the law adverse.

An essential ingredient of adverse possession is a *claim of right* hostile to the true owner. So, if one enter upon the land of another, without any color of title, or claim of right, the possession thus acquired is not adverse, but the possessor will be deemed by the law to hold under the legal owner. In such a case no length of possession will make it adverse. *Jones v. Hockman*, *supra*; *Bradstreet v. Huntington*, 5 Pet. 402 (440); *Ricard v. Williams*, 7 Wheat. 59; *Comegys v. Corley*, 8 Watts, 280; *Gray v. McCreary*, 4 Yates, 494; *Brandt ex dem. Walton v. Ogden*, 1 Johns. 156; *Jackson ex dem. Bonnell et al. v. Sharp*, 9 Id. 168.

II. The *quo animo* in which the possession was taken and held is a test of its adverse character. The inquiry, therefore, as to the intention of the possessor, is essential in order to determine the nature of his possession, and, before his possession may be pronounced adverse, it must be found that he intended to hold in hostility to the true owner. *McNamee v. Moreland*, 26 Iowa, 97. See also *Bradstreet v. Huntington*, *supra*, and the other authorities last cited.

III. The facts relied upon to constitute adverse possession must be strictly proved; they cannot be presumed. The law presumes that the possession of land is always under the regular title, and will not permit this presumption to be overcome by another presumption. There can be no such thing as conflicting legal presumptions. *McNamee v. Moreland*, *supra*; *Fele v. Doe*, 1 Blackf. 129.

IV. The defendant's grantor, when he entered upon the land in dispute, did not claim title thereto. He claimed title to lot 1, but to no part of lot 260. It is very plain that, under the authorities above cited,

the claim of right must be as broad as the possession. Defendant's claim was limited to lot 1 — his possession covered that lot, and a part of lot 260; he took possession of more land than he claimed. But, is the fact, that the *belief* of defendant and her grantor, that lot 1 extended to the line of their possession, equivalent in law to a *claim* of title to the land in dispute? The term *belief* implies an assent of the mind to the alleged fact, and is not supported by knowledge. One may believe a proposition without making it known, or without possessing any knowledge upon the subject. It is, or may be, a passive condition of the mind, prompting in neither action nor declaration. The term *claim* implies an active assertion of right, — the demand for its recognition. This assertion and demand need not be made in words; the party may speak by his acts in their support, as by the payment of taxes, erection of improvements, etc. One may *believe* that he has a right to land without asserting or demanding it. But it is said the right is asserted by the possession. This cannot be admitted, for the possession, to be supported by the law, must be under claim of right. The argument is this: The lawful possession is proved by the claim of right, which, in turn, is established by the possession. The reasoning is within a very narrow circle. But there is another objection to it upon a principle above stated. The adverse character of the possession must be strictly proved, and, in the argument just noticed, it is inferred from an alleged condition of mind.

As we have seen, the *intention*, the *quo animo* of the possessor, must be shown. This cannot be done by mere proof of possession: it must be shown to exist under certain conditions, to be qualified by the existence of a claim of right; for the adjective characteristics of a thing cannot be shown by proof of the mere existence of the thing itself.

In this case we have the possession admitted. As we have seen, it must be shown to be adverse under a claim of right. Simple belief on the part of defendant of her right to the land, we have pointed out, is not equivalent to, nor will it supply the place of, the claim required by the law, and, as we have shown, possession will not establish the *quo animo*. There is, then, in the case, absolutely no evidence of the adverse holding of defendant.

The conclusion we have announced is supported by decisions of this court, and by other authority. *McNamee v. Moreland*, 26 Iowa, 97; *Brown v. Cockerell*, 83 Ala. 45; *Hamilton v. Wright*, 30 Iowa, 480; *Burnell, Adm'r of Russell, v. Maloney*, 39 Vt. 579; *St. Louis University v. McCune*, 28 Mo. 481; *Riley v. Griffin et al.*, 16 Ga. 141; *Brown v. Gay*, 3 Greenl. 126; *Ross v. Gould*, 5 Id. 204; *Lincoln v. Edgecomb*, 31 Me. 345; *Gilchrist v. McLaughlin*, 7 Ired. 310.

V. The following cases are cited by defendant's counsel, in support of views contrary to the doctrines we have just announced. We will briefly notice them.

Burdick v. Heivly, 23 Iowa, 511, is not in conflict with the foregoing

views. In that case, there was a claim of right distinctly shown, if not an agreement of the parties to the effect, that the disputed line was in fact the true boundary of the lands. In *Close v. Samm*, 27 Iowa, 503, the right in question related to the flowing back of water upon the mill of plaintiff, by a dam built by the other party. That right was sustained upon evidence of prescription, and it was claimed to the extent exercised by defendant. Here was an express claim of right. In illustration of the ruling made by the court, Mr. Justice Cole supposes the case of conflicting claims to land adjacent to a boundary line. But the case he puts expressly supposes the party availing himself of the Statute of Limitation to *claim* the lands, and to set up an adverse possession under color of title. In *Brown v. Bridges*, 31 Iowa, 138, the right of plaintiff to recover is based upon prescription, and it clearly appears that he had *claimed* and held possession of the land in dispute, and upon that ground set up his prescriptive title. In *Stuyvesant v. Tomkins*, 9 Johns. 61, the point decided is, that trespass, *quære clausum fregit*, will not lie on behalf of one not in possession of lands. Whatever appears in that case, relating to the point under consideration, was said *arguendo*. In *Lawrence v. Hunt*, 9 Watts, 64, the claim under the Statute was based upon an actual survey, and in *Brown v. McKenney*, Id. 565, it is held that the party setting up adverse possession is protected therein, as it is expressly said by the court, under a *claim* of title to the land.

In these authorities, there is to be found nothing in conflict with the conclusions we have reached in this case.

In our opinion, the ruling of the District Court upon the facts found is correct.

*Affirmed.*¹

¹ The doctrine of this case seems to have had its origin in *Brown v. Gay*, 3 Greenl. 126 (Me. 1824) and *Gilchrist v. McLaughlin*, 7 Ired. 310 (N. C. 1847). It has prevailed to a considerable extent in the United States. See *Brown v. Cockerell*, 33 Ala. 38 (1858); *St. Louis University v. McCune*, 28 Mo. 481 (1859); and, for an extreme case, *Winn v. Abeles*, 35 Kans. 85 (1886). Its force has, however, been diminished by later authorities. In *Taylor v. Fomby*, 116 Ala. 621, 626 (1897), the court said: "It is also well settled, that if one of two adjacent land owners extend his fence so as to embrace within his inclosure lands belonging to his neighbor, in ignorance of the true boundary line between them, and with no intention of claiming such extended area, but intending to claim adversely only to the real and true boundary line, wherever it may be, such possession will not be adverse or hostile to the true owner. But if the fence is believed to be the true line, and the claim of ownership is to the fence, even though the established division is erroneous, a different rule will apply, as has been held; for, in such case, there is a clear intention to claim to the fence as the true line, and the possession does not originate in an admitted possibility of a mistake." To the same effect are *Shotwell v. Gordon*, 121 Mo. 482, 484 (1894); *Miller v. Mills County*, 111 Iowa 654, 658 (1900); *Richardson v. Watts*, 94 Me. 476, 487 (1901).

MIXTER v. WOODCOCK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1891.

[Reported 154 Mass. 585.]

WRIT OF ENTRY, dated December 7, 1886, to recover a parcel of land on Fruit Street in Worcester. After the former decision, reported in 147 Mass. 613, the action at law was changed in the Superior Court to a suit in equity. At the hearing, before *Blodgett, J.*, it appeared in evidence that John E. Luther, who died in June, 1856, leaving a widow but no issue, was seised in fee of the parcel in question; that by his will his widow, under the former decision, took a life estate only in the premises, but remained in possession from the death of the testator until her death in 1886, believing that she took an estate in fee under the will; and that she occupied them openly in all respects as her own, claiming title in fee thereto. On three several occasions, in 1862, 1876, and 1885, she gave mortgages thereof in the usual form, all of which were recorded, and all but the last of which were discharged. The plaintiff, who was the demandant in the writ of entry, was the mortgagee named in the last of these mortgages, and believed that the widow had a title in fee at the time he took his mortgage. The condition of the mortgage having been broken, he duly foreclosed, under a power of sale contained therein, and a conveyance was afterwards made to him. In August, 1886, he entered upon the premises for the purposes of foreclosure, but never had any other possession thereof. The defendant, who was a tenant in the writ of entry, made no claim of title, but was in possession at the time the writ of entry was brought, and continued in possession of the demanded premises at the time of the hearing.

The judge ruled that, as matter of law, it having been decided that the widow of John E. Luther took a life estate only under the will, she could not acquire a title in fee to the premises by adverse possession, and that the plaintiff took no title by his mortgage and its foreclosure which would enable him to maintain this suit in equity, or an action at law, against the defendant for the recovery of the land; and dismissed the bill, and reported the case for the determination of this court.

J. Mason, for the plaintiff.

J. H. Bancroft, for the defendant.

MORRIS, J. Without undertaking to say that in no case could the occupation of a life tenant be so long continued and of such a character as to vest in him a title in fee by adverse possession, and without intending to intimate that it could, we think that the ruling of the judge who heard this case was correct. Under the decision in the case of *Mixter v. Woodcock*, 147 Mass. 613, the only estate which the widow had was a life tenancy. She was in possession of the premises as a life tenant. Her belief that she owned the property absolutely did not

give her any additional rights, nor did the like belief on the plaintiff's part help matters. That simply made the mistake a common one. The widow was not in possession under a deed or instrument which purported to give her a fee, but in fact only gave her a life estate, and which might have afforded some color for her belief that she owned the fee and for her acts; she was in possession under the will of her husband, which did not purport to give, and did not in fact give, her anything except a life estate. If the mortgages executed by her may be regarded as acts of disseisin, so that the reversioner could have entered, he was not obliged to do so, but could wait until his right of entry accrued upon her death; and neither the widow nor those who claim under her would acquire any rights against him, or title to the property, by virtue of her or their occupation in the mean time. *Wells v. Prince*, 9 Mass. 508; *Wallingford v. Earl*, 15 Mass. 471; *Tilson v. Thompson*, 10 Pick. 859; *Miller v. Ewing*, 6 Cush. 84. The demandant must recover on the strength of his own title. Failing to show title, he must at least show a better right to possession than the tenant. This he does not do.

The decree dismissing the bill must therefore be

Affirmed.

BOND v. O'GARA.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1900.

[Reported 177 Mass. 189.]

WRIT OF ENTRY, to recover a tract of land situated in Leicester. Plea, general issue. Trial in the Superior Court, before *Gaskill*, J., who allowed a bill of exceptions, in substance as follows.

The demandant claimed title through a deed to him on the premises by one Lanphear, dated March 11, 1899. Lanphear's title came from a deed dated January 5, 1899, also delivered on the land, to him, by Kate Hanlon and her children, being the children and heirs of her deceased husband, John Hanlon. The tenant claimed title through a lease from the heirs of one Olney, deceased, dated December 9, 1898. The paper title was shown to be in the heirs of Olney by a series of conveyances beginning with the deed of one Burr to Buchanan, June 4, 1863. The demandant claimed that John Hanlon or his widow, Kate Hanlon, or his heirs who signed the deed to Lanphear, had acquired a title to the premises by possession for twenty years.

There was evidence tending to show that John Hanlon entered upon the premises about the year 1864, cut the wood and timber, and thereafter occupied the same for a garden and for pasturing his cow and for other purposes, the evidence tending to show that this occupation was exclusive and continuous. There was evidence tending to show that John Hanlon entered upon the premises either in pursuance of a verbal

gift of the land to him by Samuel L. Hodges, or by a permission to occupy the same granted to him by Hodges, who became owner of the premises by a deed from Patrick Hanover, dated October 30, 1865, and Hodges conveyed the same to one Gilbert and others on October 19, 1866. John Hanlon died in 1873, and thereupon his widow continued to occupy the premises in the way in which her husband had done, and in the way in which she occupied the adjoining farm, the title to which was in John Hanlon at the time of his death. Some of her children, the heirs of John Hanlon, lived with her and worked on the premises in question. The evidence tended to show that this occupation of John Hanlon during his life and that of Kate Hanlon was open and continuous and exclusive, and the principal question in controversy was whether the occupation was under a claim of right or under a license or permission from Hodges. Kate Hanlon testified, and some of her children testified, and there was evidence tending to show that the occupation was under the claim that Samuel L. Hodges had given the land to John Hanlon, and that Kate claimed to occupy it as her own because Hodges had given it to her husband.

This evidence was controverted by the tenant, who put in evidence that said Kate Hanlon had stated that Hodges had given to her husband and herself the right to occupy the premises and the right to cut the grass, etc. The deeds from Burr to Buchanan, from Buchanan to Hanover, and from Hanover to Hodges, reserved a right to the Leicester Reservoir Company, whose pond bordered on the premises, to take material for its dam from the premises; and there was evidence that an employee of the Leicester Reservoir Company had crossed the premises and had torn down a fence within twenty years, which had been put up by Kate Hanlon, and that thereupon Kate Hanlon had restored the fence. After the employee had torn it down the second time she left an opening where he could go through, and thereafter the fence was left undisturbed.

There was no evidence, except such as may be inferred from the evidence herein stated, that any of the owners of the paper title of the land, except Hodges, had ever given any license or permission, or had any knowledge of any license or permission, to John Hanlon or Kate Hanlon, or the heirs of John Hanlon, to occupy the premises.

The demandant asked the judge to instruct the jury as follows: 1. If the owner of the land verbally gave the land to John Hanlon, and thereupon Hanlon entered on the premises and occupied them continuously till his death, claiming to own them, and was not interfered with in said occupation, and immediately upon his death his widow continued to occupy the same continuously in the same way, and the whole period of such continuous occupation amounted to twenty years, the jury would be authorized to find that the title was in Mrs. Hanlon, or in her and the heirs at law of said John Hanlon, and that the title passed to the demandant by virtue of deeds which were annexed as exhibits A and B. 2. If the occupation of Mrs. Hanlon has been suffi-

cient to give a title, under the rules of law given you, but for some license or permission which might qualify such occupation, then the said license or permission must appear to be a license or permission granted by the owner before or at the time the occupation is going on, or in force during the time of such occupation. 3. Any license or permission given by Hodges during his ownership is, in itself, of no legal importance, as affecting occupancy by Mrs. Hanlon subsequent to the date when he parted with his title, and it could have no force in this case, unless there is evidence that the grantees of Hodges, while owners, renewed or adopted, or in some way intentionally continued or revived, such license or permission. 4. If the occupation of Mrs. Hanlon of the premises in question for twenty years was such that the real owner of the premises could have sued her for trespass for such occupation, then said occupation was adverse within the meaning of the law. 5. On the evidence in the present case the occupation by Mrs. Hanlon of the premises in question, cultivating the same, cutting the hay and grass on the same, and pasturing her cow thereon, was such occupation as would support an action of trespass on the part of the owner of the estate, in the absence of any license or permission given by the person who owned the premises at the time of said occupation.

The judge refused to give the instructions in the form requested, but after general instructions as to adverse possession instructed the jury, in substance, that if Hanlon's occupancy was not by gift, but by permission only, he did not acquire any right against the owner of the land; that the right of Hodges to continue that permission ceased, as matter of law, with the deed given by him on October 19, 1866; that if Hanlon, wife or children, continued to occupy on the belief that the permission continued, no right could be acquired, but that if the occupancy was on the belief that the land was theirs, and continued twenty years uninterruptedly, being adverse and open, a title would be acquired. He further instructed them that, if the first occupation by the father was adverse and the children continued their occupation, they could add the time of their occupation, if they claimed title, to that of their father, but, if not, then, if the mother's belief was that Hodges had given the land to her husband, her uninterrupted occupation for twenty years, if adverse and open, would give a good title; and that if the occupation by Mrs. Hanlon or the heirs was exclusive, except as to the right reserved to the Leicester Reservoir Company, it was sufficient, because that right was reserved by the deed and exercised thereunder.

The demandant excepted to the refusal to give the instructions prayed for, and to the actual instructions given so far as they differed from the instructions prayed for.

The jury returned a verdict for the tenant; and the demandant alleged exceptions.

F. P. Goulding, (W. C. Mellish with him,) for the demandant.

H. Parker, for the tenant.

HOLMES, C. J. This is a writ of entry. The demandant claims title under a deed from the widow and heirs of one John Hanlon, setting up a title in them by the running of the statute of limitations. There was evidence that the holding of John Hanlon and his widow and heirs had been under a claim of right adverse to all the world. There was also evidence that their occupancy had been under a license from one Hodges, who owned the land after October, 1865, and conveyed it in October, 1866. The question raised by the demandant's bill of exceptions is whether the fact that the license was ended in 1866 by the conveyance of Hodges necessarily made the occupation by the Hanlons adverse, if they supposed the license still to be in operation and purported to occupy under it, but were in such relations to the land that they would have been liable to an action of trespass, or, better to test the matter, to a writ of entry at the election of the true owner.

The answer is plain. "If a man enter into possession, under a supposition of a lawful limited right, as under a lease, which turns out to be void, . . . if he be a disseisor at all, it is only at the election of the disseisee. . . . If the party claim only a limited estate, and not a fee, the law will not, contrary to his intentions, enlarge it to a fee." *Ricard v. Williams*, 7 Wheat. 59, 107, 108; *Blunden v. Baugh*, Cro. Car. 802, 803. Stearns, Real Actions, (2d ed.) 6, 17.

It is true, of course, that a man's belief may be immaterial as such. Probably, although the courts have not been unanimous upon the point, he will not be the less a disseisor or be prevented from acquiring a title by lapse of time because his occupation of a strip of land is under the belief that it is embraced in his deed. His claim is not limited by his belief. Or, to put it in another way, the direction of the claim to an object identified by the senses as the thing claimed overrides the inconsistent attempt to direct it also in conformity to the deed, just as a similar identification when a pistol shot is fired or a conveyance is made overrides the inconsistent belief that the person aimed at or the grantee is some one else. *Hathaway v. Evans*, 108 Mass. 267; *Beckman v. Davidson*, 162 Mass. 347, 350. See Sedgwick & Wait, Trial of Title to Land, (2d ed.) § 757. So, knowledge that a man's title is bad will not prevent his getting a good one in twenty years. *Warren v. Bowdram*, 156 Mass. 280, 282.

In the cases supposed the mistaken belief does not interfere with the claim of a fee. But when the belief carries with it a corresponding limitation of claim the statute cannot run, because there is no disseisin except the fictitious one which the owner may be entitled to force upon the occupant for the sake of a remedy. *Hoban v. Cable*, 102 Mich. 206, 218. Liability to a writ of entry and disseisin are not convertible terms in any other sense. It is elementary law that adverse possession which will ripen into a title must be under a claim of right, (*Harvey v. Tyler*, 2 Wall. 328, 349,) or, as it has been thought more accurate to say, "with an intention to appropriate and hold the same as owner, and to the exclusion, rightfully or wrongfully, of every one else."

Sedgwick & Wait, Trial of Title to Land, (2d ed.) § 576. "As Co. Lit. 153 b defines, 'a *disseisin* is when one enters, intending to usurp the possession, and to oust another of his freehold'; and therefore *quaerendum est a iudice, quo animo hoc fecerit*, why he entered and intruded." *Blunden v. Baugh*, Cro. Car. 302, 303.

The other matters apparent on the bill of exceptions were sufficiently dealt with by the judge. *Exceptions overruled.*¹

NOTE. — Adverse possession, in order to be the foundation of title, must be actual, open, exclusive, and continuous. See *Ward v. Cochran*, 150 U. S. 597, 606-610 (1893). As to what constitutes actual and open possession, see *Jackson d. Hardenberg v. Schoonmaker*, 2 Johns. 230 (N. Y. 1807); *St. Louis, Alton & Terre Haute R. R. Co. v. Nugent*, 152 Ill. 119 (1894); and cf. cases on constructive possession, *post*. As to exclusive possession, see *Bailey v. Carleton*, 12 N. H. 9 (1841), *post*; *Tracy v. The Norwich & Worcester R. R. Co.*, 39 Conn. 383 (1872). As to continuous possession, see *Bowen v. Guild*, 180 Mass. 121 (1881), and cf. cases on tacking interests, *post*.

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D. Constructive Possession.

JACKSON d. GILLILAND v. WOODRUFF.

SUPREME COURT OF NEW YORK. 1823.

[Reported 1 Cowen, 276.]

EJECTMENT for land in Plattsburgh. The defendant relied on the Statute of Limitations.²

S. A. Foot, for the plaintiff.

Z. R. Shipherd, contra.

WOODWORTH, J. In September, 1794, Z. Platt executed a quitclaim deed to Nathaniel Platt for 783 acres of land, purporting to convey, thereby, lands lying between the east and south lines of allotted lands in Plattsburgh, and the line of Friswell's Patent. On examining the boundaries, and the map annexed to the case, it will be found not to include any land; for there is no gore between the two patents. The description follows: "Beginning at the distance of 7 chains, 8 links, north from the southeast corner of lot No. 99, in the second division of Plattsburgh; thence east, 27 chains and 50 links, to John Friswell's Patent." Now, as it has been shown that Friswell's Patent joins on

¹ In *Altschul v. O'Neill*, 35 Or. 202 (1899), it was held, that if A acquires land from the United States and thereafter B, without knowledge of such fact, enters and occupies the land with recognition of the supposed title of the United States, and with intention to acquire such title, and continues in such occupation for the statutory period, he does not acquire the title as against A. *Maas v. Burdatzke*, 98 Minn. 296 (1904), *contra*.

² The statement of facts is omitted, and only that portion of the opinion which deals with the question of constructive possession is given.

Plattsburgh, the line cannot be extended easterly. If it was so extended, it would run on lands included in that patent, which is not admissible under the words of the deed. The next course is to the northwest corner of Friswell, as proved by the plaintiffs; thence east, in the east bounds of Friswell's Patent, until the north line, to the lotted land in Plattsburgh, will include 783 acres, between that line and lot No. 101, in the second division of Plattsburgh. By tracing these lines on the map, it will be seen that a line only is given. No land is included: consequently the deed is a nullity, inasmuch as nothing is granted. The question, then, is whether a claim of title under such an instrument, and an annual occupancy of part, can constitute a good adverse possession beyond the parcel so occupied.

It is well settled that a continued possession for twenty years, under pretence or claim of right, ripens into a right of possession which will toll an entry. It has never been considered necessary, to constitute an adverse possession, that there should be a rightful title. *Jackson v. Wheat*, 18 John. 44; *Smith v. Lorillard*, 10 John. 356; *Smith v. Burtis*, 9 John. 180; 13 John. 120; 2 Caines, 83. The party who relies on an adverse possession must, in the language of Kent, C. J., in *Jackson v. Shoemaker*, 2 John. 234, show "a substantial enclosure, an actual occupancy, a *pedis possessio*, which is definite, positive, and notorious, when that is the only defence to countervail a legal title:" and in *Doe v. Campbell*, 10 John. 477, it is said, "adverse possession must be marked by definite boundaries, and be regularly continued down, to render it availing." 1 John. 156. There is no doubt that actual occupancy and a claim of title, whether such claim be by deed or otherwise, constitute a valid adverse possession to that extent. But when a party claims to hold adversely a lot of land, by proving actual occupancy of a part only, his claim must be under a deed or paper title. This distinction has been uniformly recognized and acted upon in this court. It is on this latter ground the defendants must rest, if their possession can avail. Their defence is that Z. Platt, in 1794, conveyed 783 acres to N. Platt, including the premises; that the first improvement was made in 1794 under Platt, being a small parcel, not exceeding two acres, which, together with the premises in question, afterwards taken under him, have been continued to the time of commencing this action. This proof does not make out an adverse possession to the premises. Color of title under a deed, and occupancy of part, is sufficient proof as to a single lot; yet it follows from the doctrine laid down that the deed, or paper title, under which the claim is made, must in the description include the premises. If the title is bad, it is of no moment; but if no lands are described, nothing can pass. The deed is a nullity, and never can lay the foundation of a good adverse possession beyond the actual improvement. There is no evidence here to show how far Platt's claim extended, unless resort is had to the deed. Boundaries, therefore, including the prem-

ises, were indispensable in order to give this defence the semblance of plausibility. The defendants stand on the same ground as if no deed had been produced; and then the possession cannot extend beyond the place actually occupied.

In *Jackson ex dem. Dervient v. Lloyd*, decided October Term, 1820, but not reported, it appeared that the defendant had a deed for lot No. 4, but took possession of Lot No. 5, adjoining, believing it to be his lot, and claiming it as such. It was held that the defendant could not establish an adverse possession to the whole lot, by the actual improvement of a part, because no part of No. 5 was included in the deed.

But if the deed had been perfect in the description, and included 783 acres of Friswell's Patent, the occupancy of a part would not make out an adverse possession to the whole quantity conveyed. The doctrine of adverse possession, applied to a farm or single lot of land, is in itself reasonable and just. In the first place, the quantity of land is small. Possessions thus taken, under a claim of title, are generally for the purpose of cultivation and permanent improvement. It is generally necessary to reserve a part for woodland. Good husbandry forbids the actual improvement of the whole. The possessions are usually in the neighborhood of others; the boundaries are marked and defined. Frequent acts of ownership, in parts not cultivated, give notoriety to the possession. Under such circumstances, there is but little danger that a possession of twenty years will be matured against the right owner; if it occasionally happens, it will arise from a want of vigilance and care in him who has title. It is believed that no well-founded complaint can be urged against the operation of the principle; but the attempt to apply the same rule to cases where a large tract is conveyed would be mischievous indeed. Suppose a patent granted to A. for 2000 acres; B., without title, conveys 1000 of the tract to C., who enters under the deed, claiming title, and improves one acre only; this inconsiderable improvement may not be known to the proprietor, or if known, is disregarded for twenty years. Could it be gravely urged that here was a good adverse possession to the one thousand acres? If it could, I perceive no reason why the deed from B. to C. might not include the whole patent, and after the lapse of twenty years equally divest the patentee's title to the whole; for there would exist an actual possession of one acre, with a claim of title to all the land comprised in the patent. No such doctrine was ever intended to be sanctioned by the court. It may therefore be safely affirmed that a small possession, taken under the deed to N. Platt, cannot under any circumstances be a valid possession of the whole 783 acres, but is limited to the parcel improved. If the doctrine contended for prevails, it would sanction this manifest absurdity that a possession under Platt's deed, which conveyed no title, would, as to its legal effect, be more beneficial than a possession taken under the proprietors of Friswell's Patent, where there is not only title, but a good constructive

possession, in consequence of the grant, and actual occupancy and improvement of a part. It cannot be useful to pursue the subject farther.

I am of opinion that the plaintiff is entitled to judgment for an undivided fourth part of the premises.¹

SAVAGE, C. J., concurred in a judgment for the plaintiff for one undivided fourth part of the premises, and the court gave

*Judgment accordingly.*²

JACKSON d. HASBROUCK v. VERMILYEA.

SUPREME COURT OF NEW YORK. 1827.

[Reported 6 Cowen, 677.]

EJECTMENT for twenty-five acres of land, including a grist-mill in Middletown, Delaware County; tried at the circuit in that county, September 1st, 1823, before *Nelson*, C. J.; when a verdict was taken for the plaintiff, subject to the opinion of this court, on a case.

Ruggles and Hasbrouck, for the plaintiff.

Sherwood and Parker, contra.

The facts are stated in the opinion of the court, which was delivered by

WOODWORTH, J. The plaintiff claimed title as the assignee of a mortgage, executed by Noah Ellis to Philip Sickler, dated Oct. 5, 1811.

The premises described, contained twenty-five acres; and included part of a grist-mill in possession of the defendant. It appeared that Ellis was in possession of the premises at the date of the mortgage, by virtue of a lease from Gen. Armstrong to him, and continued in possession for several years thereafter, when he surrendered to the mortgagee.

The defendant disclaimed having possession of any part of the twenty-five acres, excepting the mill and mill site. He read in evidence a lease from Armstrong to Andrew Sickler, dated Oct. 10, 1818, for the mill and mill site, and twenty-five acres of land, being the premises in question; which lease was assigned to the defendant. A lease from Armstrong to Ellis, dated May 1, 1802, was given in evidence by the plaintiff. It was admitted to have lately come from the hands of Armstrong. The signatures were erased, and the seals torn off. A corner of the lease with part of the description of the premises was also torn off.

By the case, the lease was to be produced on the argument; it has not been delivered to me. I am, therefore, unable to say, whether it contained any reservation of part of the premises. This fact is then to

¹ The opinion of SUTHERLAND, J., is omitted.

² See *Chandler v. Spear*, 22 Vt. 338, 404 (1850). Cf. *Davis v. Davis*, 68 Miss. 478 (1891).

be ascertained by the testimony of Ellis, which was not objected to. He says the lease was in his possession, when the mortgage was given; that the corner was torn off accidentally; that the seals remained on as long as he held it. The description of the premises included a part of the mill. Ellis also testified, that he did not know that the defendant had ever been in the actual occupation of any part of the premises, excepting the mill and pond. He could not say from recollection, but he believed the lease contained an exception of mill sites, from the circumstance of his obtaining permission from Armstrong to build the mill; and from knowing that mill sites were excepted in all his leases. The witness never claimed the mill site under his lease. On this state of facts, I think we are to consider, that, in the lease to Ellis, the mill site was excepted. I presume by inspection of the lease, it cannot be determined whether excepted or not. This, however, is not expressly stated. I apprehend that neither party would be disposed to rest on parol testimony, as to the contents, unless the lease had been defaced, or a part of it destroyed.

On this statement, the plaintiff made out a title to recover the twenty-five acres, excepting so much as was comprehended within the mill site reserved; provided the defendant was in possession of the land not included in the mill site. He admitted he had possession of a part, (the mill and mill site,) not exceeding two acres. The plaintiff offered no testimony as to the extent of the defendant's actual occupancy; but contends that, as Armstrong conveyed to the person under whom the defendant derives title, the whole twenty-five acres, the defendant is to be considered as the possessor to that extent.

It appears that the premises are woodland. There are no improvements. The right of Ellis passed to the plaintiff by virtue of the mortgage. The land has never been actually occupied: but it will be recollected that the lease to Ellis contained sixty-three acres, of which the twenty-five acres mortgaged, were parcel; that Ellis actually occupied a part of the sixty-three acres, and claimed title to the whole; so that, although the twenty-five acres were unimproved, he had a good adverse possession to the whole, on the ground of occupancy of a part, and a lease including the sixty-three acres. The conveyance obtained from Armstrong in 1818, although it includes the twenty-five acres, conferred no title to anything but the mill site; neither can it operate so as to transfer to the defendant a constructive possession of the twenty-five acres, in consequence of his having possession of the small parcel comprising the mill site.

I think the defendant must be considered as claiming title to the twenty-five acres; having accepted an assignment of the lease which comprised them.

Color of title under a deed, and occupancy of a part, is sufficient proof to constitute an adverse possession to a single lot. (1 Cowen, 286.) This principle applies only to cases where there is no actual occupancy under a different claim. Thus, if A. takes a lease or con-

veyance for a lot of sixty-three acres, and improves a part, his possession is valid for the whole lot; not on the ground of having title, which draws the possession after it, until an actual adverse possession commences; but on the ground of a claim of title to the whole, and a possession of part, which constitutes a good adverse possession. When a valid possession is acquired in the latter mode, it cannot be defeated by a subsequent entry on the same lot, making an improvement of a part, and obtaining title to the whole. The effect of such subsequent entry would be, to give the person so entering, a possession of the part actually occupied and improved; but no farther. A constructive possession to the unimproved part of the lot, would remain in him who made the first entry under claim of title, and improved a part. Apply this principle to the present case. The possession under Ellis, of the twenty-five acres, was not impaired by the assignment of the lease of 1818 to the defendant, and occupation of the mill by him. It appears that Ellis never claimed the mill site. The consequence is, that the defendant was not in possession of the twenty-five acres, except that part thereof which constituted the mill site; and for that portion the plaintiff is not entitled to recover.

Neither can he recover that part which is covered by a part of the mill and the pond, supposed to contain not more than two acres; because Armstrong, having reserved mill sites in his lease to Ellis, afterwards granted the same by a conveyance under which the defendant claims. And although there is no specific description of the quantity of land reserved, it must be intended to include so much as might reasonably be required for the purpose of erecting and carrying on the business of a mill. The defendant has located and entered upon a small parcel for that purpose; which the facts in the case do not enable me to say was unreasonable or too extensive. It is contended that the reservation was merely an easement or privilege; but this is evidently a mistake. A mill site is reserved, which is a reservation of so much land as may be necessary for the purpose of erecting and working a mill. The plaintiff has not shown how much land the defendant actually occupies as a mill site. The defendant admits the quantity of two acres. Under his grant, he must be considered as having located this parcel, as appurtenant and necessary to the mill. There is nothing in the case to show that this was too extensive. It is not material, whether the location was made before or after the execution of the mortgage; for if the mill site was reserved, no right to it was acquired by the mortgage; and the defendant might actually enter on, and locate the premises, as well after as before.

I am, therefore, of opinion that, as to the mill site on which the mill was erected, the defendant has shown title; and as to the twenty-five acres of woodland, the defendant was not, in judgment of law, the possessor. Consequently the defendant is entitled to judgment.

*Judgment for the defendant.*¹

¹ See *Ralph v. Bayley*, 11 Vt. 521 (1839); *Bradley v. West*, 60 Mo. 33, 40 (1875).

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SIMPSON v. DOWNING.

SUPREME COURT OF NEW YORK. 1840.

[Reported 23 Wend. 816.]

THIS was an action of *ejectment*, tried at the Schoharie Circuit, in October, 1838, before the *Hon. John P. Cushman*, one of the circuit judges.

The plaintiffs claimed to recover seventy-four acres of land, part of three hundred and eight acres in a tract called Banyar's patent, granted in 1770, and deduced a regular title to the three hundred and eight acres, from the original patentees, by sundry mesne conveyances, to themselves. The defendants, on their part, gave in evidence: 1. A *mortgage* from one Jacob Horn to John Thurman, bearing date 2d March, 1800, of a tract of land containing two hundred and five acres, three roods, and sixteen perches, described as part of lot number seven, in a tract granted to John Morin Scott *and others*; 2. A deed from Horn to Nehemiah Finch, dated 11th June, 1806, of the same premises; 3. Proof of the death of Finch; letters of administration upon his estate granted to Philip Cornell, on the 1st April, 1818, and a surrogate's order made 10th June, 1816, authorizing the sale of the premises described in the deed from Horn to Finch, but requiring that one Titus Reynolds should unite in the sale and conveyance of the premises; 4. A deed under the surrogate's order, from Cornell, the administrator, to John Collins, bearing date 18th March, 1819, duly executed by Collins; *but Reynolds, the person named by the surrogate, did not unite in its execution*; 5. A deed dated 24th August, 1819, from Collins to Elizabeth Gilchrist; 6. A deed from Robert Gilchrist, the son and heir-at-law of Elizabeth Gilchrist, to Downing, one of the defendants in this cause, dated 15th January, 1828, and then a conveyance of a portion of the premises from Downing to the other defendants. The seventy-four acres claimed by the plaintiffs, are part of the Banyar patent, but are included in the boundaries of the premises conveyed by the deeds produced on the part of the defendants. Horn took possession of his farm in 1792; in 1800 he had it surveyed, taking in the seventy-four acres, and *claiming as his own* the whole two hundred and five acres, as *part of lot number seven, of Scott's patent*. Finch, after the conveyance to him, and probably within four years thereafter, cut timber upon the seventy-four acres, for the erection of a barn, and he and those claiming under him from time to time cut timber upon the seventy-four acres for fuel and fencing. In 1823 Downing, previous to his purchase, had a survey made of the two hundred and five acres, including the seventy-four acres, which at that time was woodland, uncleared and unenclosed. No acts of ownership on the part of the plaintiffs as to the seventy-four acres were shown, except that in 1801 the plaintiffs employed an agent to prevent tres-

passes on the three hundred and eight acres owned by them, including of course the seventy-four acres, who in one or two instances called trespassers to account. A small part of the *undisputed* portion of the plaintiffs' land was cleared and cultivated as early as 1800. The bill of exceptions, after setting forth the evidence, proceeded thus: "And the said judge so holding the said circuit court, did then and there deliver his *opinion* to the jury, and *charge* them" that the plaintiffs had made out a good paper title to the premises in question; that the defendants had failed to make out a good *paper title*, under which they had possessed the premises in question for twenty-five years, inasmuch as Reynolds, the person designated by the surrogate, had not united with the administrator in the execution of the deed to Collins, and consequently that such deed did not convey any title. That to constitute an *adverse possession*, it was incumbent upon the defendants to show twenty-five years' possession; that the possession *prior* to 1819, the date of the deed to Collins, did not make out the necessary time; and the possession *since* that period was unavailable, because the deed from the administrator did not divest the *legal title* of the *heirs* of Finch, and consequently there was not a *continuance* of the adverse possession; "and with that direction and under the said charge, left the cause with the jury," as expressed in the bill of exceptions. The bill then proceeds: "Whereupon the counsel for the defendants did then and there *except* to the aforesaid *opinion* and *charge* of the said judge, and insisted that the said deed of the said Cornell, administrator as aforesaid, although defective, was sufficient to constitute an adverse possession in the defendants; and that from the testimony, the defendants were entitled to a verdict, for the reason aforesaid. Whereupon the said jury then and there, under the said charge of the circuit judge, gave their verdict for the said plaintiffs," &c.

BY THE COURT. (COWEN, J.) Only two legal points were made by the judge in the charge: one, that the plaintiffs had established a good paper title; the other, that the defendants had failed to continue their line of deeds. The bill excepts to the aforesaid *opinion* and *charge*, leaving it somewhat equivocal *which opinion*, or whether *the whole charge*. But the bill immediately adding in connection with the exception, "and insisted that the said deed of the said Cornell was sufficient," &c., specifically indicates the ground of exception. It is saying, in other words, (though I admit somewhat inaptly,) that the counsel excepted because the deed was sufficient to make out the privity. The great purpose in requiring the point and object of exception to be mentioned is, that notice may be given to the court and opposite party. In this case, for instance, admitting the deed to be valid, it was not yet too late for the court to allow, in its discretion, evidence that the defendants had acknowledged the plaintiffs' title, or any other fact overcoming the defence of adverse possession. They were, I think, in this respect put upon their guard by the words connected with, and explaining the extent of the exception. This view is not incompatible with

the rule laid down in *Willard v. Warren*, 17 Wendell, 258-9. Besides, the exception was not only to the "aforesaid opinion," but also to the charge. It being plain that two points of law only were stated in the charge, it would not be a strained construction to say the exception to the charge reached both those points. The same thing was done in *Harlow v. Humiston*, 6 Cowen, 189. Of this there is certainly some doubt, where the charge is not so far, as inserted in the bill, exclusively confined to points of law; and so where the points of law are numerous. Indeed it may not be a safe rule to say that where there is more than one, the exception need not distinguish which it is intended to reach. The substance of the exception should always be settled and clearly understood, and noted down at the trial. The matter to which it applies should also be well understood there. It is, therefore, the better way, if not, in general, essential, to mention the particular point in the charge.

There can be no doubt of the rule insisted on by the counsel for the plaintiffs, that could we suppose each of the parties to have, from the beginning, stood in such a relation to the premises as, without title, would constitute in them respectively a constructive adverse possession, the one who superadded the legal title should prevail. It would be like the case of an actual possession in both, claiming adversely. Other things being equal, the legal right turns the scale. Adams on Eject. 54, ed. by Tillinghast, and note 8d there. See also *Bryant v. Allen*, 2 Hayw. Rep. 74. It is plain, however, that a constructive adverse possession, arising from circumstances, precisely coeval and concurrent, must be a rare case. One, in general, closes the door against the other, at least by priority of time.

Accordingly, such a community of possession as might neutralize the defendant's claim, not being entirely clear in the principal case, the learned judge at the circuit put it on a defect in the deed under the surrogate's order. The plaintiffs, therefore, cannot now say they are entitled to recover, if that deed was valid for the purpose of keeping up the continuity of possession on which the defence rested. No doubt that, as the Statute regulating probate conveyances stood when the deed was concocted and executed, it was void on its face. That was admitted at the circuit, and not denied at the bar. It is equally clear that where an adverse possession in several persons successively is necessary to complete the term of limitation, they must show an unbroken transmission of the possession from one to the other, during a sufficient number of years to satisfy the Statute of Limitations. In this case the limitation beginning to run before the Revised Statutes were passed, the time was twenty-five years. *McCormick v. Barnum*, 10 Wendell, 104.

Had the claim here been of an actual adverse possession continued from Horn down to the defendants, perhaps there would have been less difficulty. Everything then would be manual and tangible. The *pedis possessio* would be seen devolving from one to another; and a vicious,

even a void deed, intervening, might not take from the effect. But this is by no means clear. The rule, as laid down in the books, is that there must be an adverse possession by the defendant or by those *under whom he holds*, or both, for the term of limitation. Adams on Eject, ed. by Tillinghast, 47. Can one be said to hold an adverse possession under another, in any case, without privity either of contract, blood or estate? Be that matter as it may, however, it seems to me that many arguments combine to show that privity is necessary to the continuity of *constructive possession*, when we regard the notion of that kind of possession as it prevails under the law of this State. Of such a possession, I understand a *deed*, or some *instrument* sufficient in form for the purpose of carrying title, to constitute an essential ingredient. It is made up of an actual possession of part, claiming the whole under a deed which covers the whole. In such case and not short of that, is the grantee said to be in constructive possession of the part unoccupied. Finch began with such a possession by his deed from Horn in 1806. That possession continued in him to 1813 at farthest, when he died; and after an interval of five or six years, a conveyance is executed by Cornell, his administrator, to Collins, void on its face for every purpose of passing any interest. Collins may then be taken as beginning a constructive adverse possession *de novo*. But this leaves the defence short of twenty-five years. It wants the connecting link between Finch and Collins,—a possessory link, I admit; but that appears to me to depend on a valid deed, without which I do not see how another deed, one essential element, is to be transferred. Collins took no actual possession. There has been none in any of his successors. Either as an actual possessor or in some other way he must come into Finch's shoes; but all the interest of the latter was suffered to descend to his heirs. Suppose Finch had conveyed in his lifetime and Collins had come in under a deed from a total stranger, driving off and dispossessing Finch's grantee; Cornell was but a stranger, and Collins took adversely to Finch's heirs. The line of continuation lay through them. Both Finch's possession and that of his heirs was, I admit, a wrong. The Statute of Limitations, however, had begun to run. They had a right to say that this wrong should be continued and made available in their successors. But it was not such a wrong as would work a right in any hands without Finch's deed, or his title under it. Every adverse possession is a wrong amounting to an inchoate right. In the latter sense, it is transferable by sale or gift; but when *constructive*, there is no corporal seisin which can be transferred by livery. It is in the nature of an incorporeal right. True, there must be a corporal, not to say a contiguous, possession of part; but that is amplified and spread over the actually vacant premises lying adjacent, by a deed in the tenant's bureau. The right is thus extended in theory or contemplation of the law; and when the essential elements no longer co-exist, the complex idea vanishes, or dwindles to the actual, corporal, territorial limit. The English law has never, I believe, admitted the refine-

ment which creates a constructive possession by mere claim, though under color of a wrongful deed. It seems to prevail, however, under divers limitations in several different States. At any rate, it has long been recognized as existing in this State: *Jackson, ex dem. Putnam, v. Bowen*, 1 Caines, 358; *Jackson, ex dem. Bristol, v. Elston*, 12 Johns. R. 452, 454; though its practical application seems not to have been well understood till *Jackson, ex dem. Gilliland, v. Woodruff*, 1 Cowen, 276; *Jackson, ex dem. Ten Eyck, v. Richards*, 6 Id. 617, 623; and *Jackson, ex dem. Hasbrouck, v. Vermilyea*, Id. 677. *Vid.* also *Jackson, ex dem. Gee, v. Oltz*, 8 Wend. 440, 1.

The rule was found so well adapted to the exigencies of new and unsettled parts of the State that it was afterwards expressly adopted and its operation limited according to our adjudications, by the Revised Statutes, 2 vol. 222, 2d ed. Under either the common law or Statute rule, the ideal possession cannot be extended, by a written instrument, beyond the customary size of the lot or farm partly occupied. The size must accord with the usage of the adjoining country; and section 9th declares that there must be a *continued occupation* for twenty years under *such claim; i. e., under the written instrument, &c.*, which works the extension. The abstraction once being formed must take a course in the regions of technical jurisprudence to be regulated by analogies, drawn from other branches of the law, — mainly, I admit, from the doctrine of actual possession, to which it is regarded as an equivalent. Thus, co-existing or mixed with another like possession, it is, as we have seen, neutralized. But the prior abstraction fills the described territory, and prevents the interference of one subsequently arising in the hands of a third person, though an actual possession by the latter will overcome the abstraction. *Jackson, ex dem. Hasbrouck, v. Vermilyea*, before cited. What then is continuity of estate, as understood in analogous branches of the law? How is the claim of the successor to be identified, in the language of the Revised Statutes, (for I take these to be but a repetition of the principle as it stood before,) with the prior wrongful adverse claim under the same instrument? The answer seems obviously, by such conveyances from one to another as, supposing a good title to exist, would transfer that title. It is essential, to effect such a purpose, that the original deed at least, whatever title there was under it, should pass along the line by conveyance. Clearly such a probate deed as we have here would not work the effect. The death would leave the deed itself to descend, as a part of the inheritance. So in many cases the right to the deed passes from one to another in virtue of the grant of the whole estate holden under it. *Buckhurst's Case*, 1 Rep. 1. It is the same thing where we are inquiring for the continuance of a wrongful deed or title. As between the parties who stand along the line of succession, the title is looked upon as rightful. The deed to be carried may contain a warranty, and thus be material to the grantee as an indemnity. The deed to Finch might thus have passed along the whole line from Horn to the defendants. Coming

to Finch, however, his death and the void deed from his administrator to Collins, broke the concatenation. Being void, it was as no deed; and we concur with the circuit judge that the defence by adverse possession can date only from the administrator's deed. The time being thus short of the limitation, the verdict was therefore right; and a new trial should be denied.

By the CHIEF JUSTICE. This case might have been placed at the circuit on the ground that the plaintiffs had shown a legal title in fee to the premises in question, and an actual possession of part claiming title to the whole, long before the commencement of the constructive adverse possession of the defendants now set up; and which possession and claim continued down to the commencement of the suit.

But I think it may also be maintained on the ground taken by Mr. Justice Cowen, — Cornell, the administrator, not having been joined in the deed by the discreet freeholder, is to be regarded as a stranger to the premises; his deed therefore did not convey even a right to the possession of Finch, the intestate: that went with the claim of title to his heirs. The continuity of Finch's possession was thereby broken; the defendants not connecting themselves with it.

Whatever, therefore, may have been the character of the adverse possession shown by the defendants, it fell short of the requisite time to bar the plaintiffs. *New trial denied.*

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BAILEY v. CARLETON.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1841.

[Reported 12 N. H. 9.]

WRIT OF ENTRY, to recover two tracts of land in the lower village in Bath, one of said tracts being ten rods in length, and the other being four square rods of land, situated immediately south of and adjoining the first tract; both constituting a narrow strip of land, situated betwixt the main road through Bath village, and the Amonoosuck River.

The tract of land first described, and a house lot opposite to the same, on the other side of the road, were conveyed to Amos Town by Moses P. Payson, by two several deeds, executed on the 27th of March, 1807; and the tract containing four square rods was conveyed by said Payson, in November, 1807, to Buxton & Blake, who sold to one Morrison, and, in 1810, Morrison sold to said Town.

In February, 1813, Amos Town sold the three tracts of land to his brother, Solomon Town, and in April, 1815, Solomon Town reconveyed the house lot opposite the demanded premises, to Amos Town, but did not include, in the description, the strip of land opposite, and now in controversy.

October 19, 1815, Amos Town conveyed the aforesaid three several tracts, giving separate descriptions of each tract, to Ebenezer Carleton, and subsequently Carleton's title was conveyed to these defendants.

Solomon Town, in June, 1830, conveyed the demanded premises to one John Welsh. Welsh, in February, 1837, conveyed to the plaintiff, and this suit was brought for the recovery of the demanded premises, the 15th of April, 1837.

It appeared that Ebenezer Carleton, on his purchase of Amos Town in October, 1815, entered into possession of the house lot named in his deed, and lived on and occupied the same for many years, until it was conveyed to the defendant, E. Carleton, Jr.

In 1821, Ebenezer Carleton caused a small building to be removed on to the land in controversy, and from that time to the present it has remained there, occupied by tenants under him and these defendants.

The defendants claimed to hold the land by virtue of peaceable and undisturbed possession, by themselves and their grantor, for a period of twenty years. It appeared that until 1821 no building had been placed upon the premises, and that the premises had not been enclosed in any manner; that from 1815 to 1821, and since, Ebenezer Carleton had been in the habit, occasionally, of leaving carts, ploughs, and farming utensils upon this land, and also of leaving lumber upon it. Evidence was offered to show that it had been a common practice, by teamsters and owners of lumber, for thirty or forty years, to lay lumber upon that side of the road, in Bath village, upon this tract, and above and below it, and that said Carleton and other individuals had been in the habit of laying lumber along the river bank in this manner.

It was contended, by the defendants' counsel, that Ebenezer Carleton having entered upon the house lot, claiming title to and occupying the same, such entry extended to the contiguous tracts described in the same deed, and that entry and occupation of one of the tracts extended to the whole, in the same manner as though they had been conveyed in one description; that the defendants' grantor having entered upon and disseised the plaintiff's grantor, October 19, 1815, and the plaintiff never having re-entered before action brought, he had no legal seisin in the demanded premises within twenty years next before the commencement of his action, and his suit, therefore, could not be maintained; and that the laying of lumber on the demanded premises, by persons claiming no right thereto, would not affect the exclusive character of the defendants' adverse possession.

The court instructed the jury that an entry upon, and occupation of one of the tracts conveyed, would not extend to the other tracts described in the deed, so as to give a title to them by possession; that entry upon, and occupation of, any portion of the demanded premises would extend to the whole tract entered upon; that it was not essential that any portion of the land should be enclosed, in order to constitute an adverse possession; that such possession might be acquired by the laying of lumber upon said tract, or otherwise occupying it as a place of deposit for farming utensils, &c., but that such possession must be an open, visible possession, such as would give reasonable notice of such adverse possession, to the owner.

A verdict was rendered for the plaintiff, and the defendants moved to set the same aside, for misdirection.

J. L. Carleton and Bell, for the defendants.

Goodall (with whom was *Bartlett*,) for the plaintiff.

PARKER, C. J.¹ The general rule that where a party having color of title enters into the land conveyed, he is presumed to enter according to his title, and thereby gains a constructive possession of the whole land embraced in his deed, seems to be settled by the current of authorities, 3 N. H. Rep. 27, *Riley v. Jameson*; Ditto, 49, *Lund v. Parker*, and cases cited.

And such entry may operate as a disseisin of the whole tract; and the possession under it, continued for the term of twenty years, may be deemed an adverse possession, which will bar the entry of the owner after that lapse of time. 3 N. H. Rep. 49; 13 Johns. R. 118, *Jackson v. Ellis*; Ditto, 406, *Jackson v. Smith*; 18 Johns. 855, *Jackson v. Newton*.

Exceptions have been suggested to the rule in some cases. One is, where a large tract of land is embraced in the deed, and a small part only has been improved. 1 Cowen, 276, *Jackson v. Woodruff*; 6 Cowen, 677, *Jackson v. Vermilyea*. Another, where the deed under which the claim is made includes a tract greater than is necessary for the purpose of cultivation, or ordinary occupancy. 8 Wend. R. 440, *Jackson v. Oltz*.

These exceptions seem not to be very definite in their application, for lots, like other things, are large or small by comparison, and a tract which would be much too large for cultivation by one, would not suffice for another. But they serve to show the principle upon which the rule is founded. It is, that the entry and possession of the party is notice to the owner of a claim asserted to the land; that the limits of such claim appear from the deed; and that if the owner for twenty years after such entry, and after notice, by means of the possession, that an adverse claim exists, asserts no rights, he may well be presumed to have made some grant or conveyance, co-extensive with the limits of the claim set up, or that, after such lapse of time, a possession, under such circumstances, ought to be quieted.

There should be something more than the deed itself, and a mere entry under it, — something from which a presumption of actual notice may reasonably arise. It is not necessary to show actual knowledge of the deed. Acts of ownership, raising a reasonable presumption that the owner, with knowledge of them, must have understood that there was a claim of title, may be held to be constructive notice; that is, conclusive evidence of notice. 8 N. H. Rep. 264, *Rogers v. Jones*. The owner may well be charged with knowledge of what is openly done on his land, and of a character to attract his attention. The presumption of notice arises from the occupation, long continued; and the notice of the claim may well be presumed, as far as the occupation indicates that a claim exists, and the deed, or color of title, serves to define specifically

¹ Woods, J., having been of counsel, did not sit.

the boundaries of the claim or possession. If the occupation is not of a character to indicate a claim which may be co-extensive with the limits of the deed, then the principle that the party is presumed to enter adversely according to his title, has no sound application, and the adverse possession may be limited to the actual occupation.

Thus cutting wood and timber, connected with permanent improvements, may well furnish evidence of notice that the claim of title extends beyond the permanent improvements, and the deed be admitted to define the precise limits of the claim and possession, provided the cutting was of a character to indicate that the claim extended, or might extend, to the lines of the deed. It might, at least, well indicate a claim to the whole of a tract allotted for sale and settlement, of which the party was improving part, unless there was something to limit the presumption. But no presumption of a claim, and of color of title beyond the actual occupation, could arise respecting other lots than that of which the party was in possession. And where the possession was in a township, or other large tract of land, which had never been divided into lots for settlement, no particular claim, beyond the actual occupation, would be indicated, and of course no notice of any such claim of title should be presumed. 6 Cowen's R. 617, *Jackson v. Richards*; 15 Wend. R. 597, *Sharp v. Brandon*.

If the possession was not of a character to indicate ownership, and to give notice to the owners of an adverse claim, although the grantee might be held to be in possession according to his title, in a controversy with one who should make a subsequent entry without right, his possession ought not to be held adverse to the true owner, to the extent of his deed, merely by reason of the deed itself, even if recorded, nor by any entry under it. There are several cases which tend to sustain this view of the principle. 6 Pick. R. 172, 176, *Poignard v. Smith*; 13 Maine R. 178, *Alden v. Gilmore*; 4 Mass. R. 415, *Prop'rs of Kennebeck Purchase v. Springer*; 4 Vermont R. 155, *Hapgood v. Burt*; 1 Peters' R. 41, *Ewing v. Burnet*; 2 Greenl. 176, *Little v. Megquier*.

We are of opinion that the rule cannot apply to a case where a party, having a deed which embraces land to which his grantor had good title, and other land to which he had no right, enters into and possesses that portion of the land which his grantor owned, but makes no entry into that part which he could not lawfully convey. There is no notice in such case to the owner of the land thus embraced in the deed, and no possession which can be deemed adverse to him. If it may be said that the color of title gives such a constructive seisin and possession that the grantee could maintain trespass against any person who did not show a better right, (that is, a title, or prior possession,) there is nothing in the nature of it which can give it the character of a disseisin, or possession adverse to the true owner, so as to bind him. For that purpose, there must be actual possession of some portion of the land of such owner, and that of a nature to give notice of an adverse claim.

It is not necessary to settle whether an entry into an enclosed lot, under a deed purporting to convey unenclosed lands adjoining, belonging to the same person, would operate as a disseisin of the latter. Where two separate lots, included in the same deed, belong to different owners, an entry into one can in no way operate as a disseisin in relation to the other.

The entry into the house lot, therefore, to which Amos Town, who conveyed, had title, was no disseisin of Solomon Town, who had title to the lot unenclosed, on the other side of the road.

The next question is, what entry into the land itself is sufficient.

Here was an entry in 1821, upon the tract in dispute, and a possession, by placing a building on it, by Ebenezer Carleton, the grantor of the defendants. This was, without doubt, an act of ownership. The character of it was adverse to the title of Solomon Town, and it was of a nature to give notice that Carleton claimed title to that land.

But the possession before that time was of a more ambiguous character.

Ebenezer Carleton, to whom the conveyance was made in 1815, made no entry or use of the lot up to 1821, except by laying lumber upon it, or placing farming utensils there. Those acts by one having a deed, if nothing further was shown, might be held to be a sufficient entry and possession to operate as a disseisin of Solomon Town. But it appeared that so far as the laying of lumber on the lot was concerned, this was no more than Carleton, and divers other persons, had been in the habit of doing before, and that others continued to do the same afterwards. Those acts, prior to 1815, were done by him, and others, without claim of title, and of course in subservience to the title of the true owner. If not acknowledged trespasses, they must have been under a license from Solomon Town. The same acts continued after a deed of other lands, by a person having good title to those lands, could not operate as any notice to the owner of this tract, that a deed had been made covering his land also, and that there was an occupation under that deed, or under any claim of right to occupy adversely to him. The additional act of leaving farming tools on the land does not seem to change the character of the possession.

It was not, therefore, until 1821, when the building was removed on to the land, that any entry was made upon it by Carleton, from which Solomon Town, with knowledge of the entry, should have understood that Carleton made any claim to the ownership of the lot; and until that time, therefore, there was nothing from which an ouster can be inferred, and no possession by him that can be deemed adverse except at the election of the owner. 21 Pick. 140, *Magoun v. Lapham*; 13 Maine, 336, *Thomas v. Patten*.
Judgment for the plaintiff.

E. Tacking Interests.

DOE d. CARTER v. BARNARD.

QUEEN'S BENCH. 1849.

[Reported 18 Q. B. 945.]

EJECTMENT for a cottage in Essex. Demise, 13 May, 1848.

On the trial before *Coltman, J.*, at the Essex Summer Assizes, 1848, it appeared from the evidence given for the lessor of the plaintiff that in 1815 one Robert Carter purchased the premises and was let into possession; but as he did not pay all the purchase-money until 1824, no conveyance was executed till that time. Robert Carter, immediately after his purchase in 1815, allowed his son John to occupy the premises rent free as tenant at will; and he continued so to occupy until 1834, when he died, leaving a widow, who was the lessor of the plaintiff, and a son and other children. Robert Carter, the father, was at that time still living. The lessor of the plaintiff had occupied from the time of her husband's death until a short time before the present action was brought. The defendant claimed under a mortgage made by Robert Carter in 1829. For the defendant it was contended that assuming a title to have been shown in John Carter, the lessor of the plaintiff could not recover. The learned judge directed a verdict for the plaintiff, and reserved leave to the defendant to move to enter a nonsuit.

Chambers, in last Michaelmas Term, obtained a rule *nisi* for a nonsuit, and also for a new trial, on the grounds of misdirection, and that the verdict was against the evidence. In last Trinity Term,¹

Shee, Serjt., and *Peacock*, showed cause.

Chambers and *Lush*, contra.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the court.

The lessor of the plaintiff proved no title, but relied on long possession: viz. her own for thirteen years, and her husband's before her for eighteen years; but in so doing she showed that her husband left several children, one of whom was called as a witness. If the husband's possession raised a presumption that he was seised in fee, that fee must have descended on his child, and of course the lessor of the plaintiff must fail. But she contends that because the husband's possession was for less than twenty years, no presumption of a seisin in fee arises; that she is entitled to tack on her own possession to his; and then that the 34th section of Stat. 8 & 4 W. 4, c. 27, which enacts "that at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare*

¹ May 25th and 29th. Before LORD DENMAN, C. J., PATTESON, COLERIDGE, and KELE, JJ.

impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished," has put an end to the right and title of all persons, and transferred the estate to her. If she had been defendant in an action of ejectment, no doubt the non-possession of the lessor of the plaintiff, evidenced by her husband's and her own consecutive possession for more than twenty years, would have entitled her to the verdict on the words of the 2d section of the Act, without the aid of the 34th section.¹ Therefore it is said that the 34th section must have some further meaning, and must transfer the right. Probably that would be so if the same person, or several persons, claiming one from the other by descent, will, or conveyance, had been in possession for the twenty years. But this lessor of the plaintiff showed nothing to connect her possession with that of her husband by right of any sort; and if she be right in her construction of the 34th section, the same consequence would follow if twenty persons unconnected with each other had been in possession, each for one year, consecutively for twenty years; yet it would be impossible to say to which of the twenty persons the 34th section has transferred the title. Without the aid of this Statute, twenty years' possession gave a *prima facie* title against every one, and a complete title against a wrongdoer who could not show any right, even if such wrongdoer had been in possession many years; provided they were less than twenty: *Doe dem. Harding v. Cooke*, 7 Bing. 346; and the effect of the 34th section would probably be to give the right to the possessor for twenty years, even against the party in whom the legal estate formerly was, and, but for the Act, would still be, where he had not obtained the possession till after the twenty years; but then we apprehend, as before stated, that such twenty years' possession must be either by the same person or several persons claiming one from the other, which is not the case here.

¹ So, *Doe d. Goody v. Carter*, 9 Q. B. 863 (1847).

Stat. 3 & 4 Wm. IV, c. 27, §§ 2, 7, provided as follows: "II. And be it further enacted, that after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.

"VII. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined; provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

The lessor of the plaintiff must therefore rely on her own possession for thirteen years as sufficient against the defendant, who has turned her out and shows no title himself. According to the case of *Doe dem. Hughes v. Dyball*, Moo. & M. 846, that possession for thirteen years would be sufficient; for in that case the lessor of the plaintiff showed only one year's possession, and yet Lord Tenterden said, "That does not signify; there is ample proof; the plaintiff is in possession, and you come and turn him out: you must show your title." See also *Doe dem. Humphrey v. Martin*, Car. & Marsh. 32. These cases would have warranted us in saying that the lessor of the plaintiff had established her case, if she had shown nothing but her own possession for thirteen years. The ground, however, of so saying, would not be that possession alone is sufficient in ejectment (as it is in trespass) to maintain the action, but that such possession is *prima facie* evidence of title, and, no other interest appearing in proof, evidence of seisin in fee. Here, however, the lessor of the plaintiff did more, for she proved the possession of her husband before her for eighteen years, which was *prima facie* evidence of his seisin in fee; and, as he died in possession and left children, it was *prima facie* evidence of the title of his heir, against which the lessor of the plaintiff's possession for thirteen years could not prevail; and therefore she has by her own showing proved the title to be in another, of which the defendant is entitled to take advantage. On this ground we think that the rule for a nonsuit must be made absolute. *Rule absolute for a nonsuit.*¹

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FANNING v. WILLCOX.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1808.

[Reported 3 Day, 258.]

MOTION for a new trial.

This was an action of ejectment, to which the general issue was pleaded.

On the trial, the plaintiff claimed the land in question as devisee under the will of Thomas Fanning, deceased, to whom it had been appraised and set off under an execution against Joseph Noyes. It was admitted that the plaintiff had a good and legal title, unless barred by the Statute of Limitations.

The defendants were in possession as tenants under Nathaniel Palmer. It appeared that after the levy of Thomas Fanning's execution,² Noyes continued in possession until within fifteen years of the

¹ See *Asher v. Whitlock*, L. R. 1 Q. B. 1 (1865); *Board v. Board*, L. R. 9 Q. B. 48 (1873); *Peele v. Chever*, 8 All. 89 (Mass. 1864).

² It is not expressly stated in the motion that the levy of Fanning's execution took place, and the adverse possession of Noyes commenced, more than fifteen years before the plaintiff brought his action; but this was the fact, and the case proceeds entirely upon the supposition of its existence. — R.R.P.

time of bringing this action, but had gained no title. Nathaniel Palmer, having no title, then commenced an action of ejectment against Noyes for the land. Noyes suffered judgment to pass against him by default, and abandoned the land; upon which Palmer took possession, without the levy of an execution.

The court, in their charge to the jury, instructed them that if they should find that the plaintiff's record title was complete, and the defendants, or those under whom they claim, had no title of record, yet the law was so that if any other person had been in possession of the land, claiming adversely to the plaintiff's title, and the possession of such person, together with the possession of the defendants, and those under whom they claim, amounted to a period of more than fifteen years previous to the commencement of this action, during which the plaintiff was ousted of the possession, he was not entitled to recover. The jury found for the defendants; and the plaintiff moved for a new trial, which motion was reserved for the opinion of the nine judges.

Goddard, in support of the motion.

Ingersoll, contra.

BY THE COURT.¹ Actual ouster and adverse possession of any lands, tenements, or hereditaments, for fifteen years after the title, or cause of action accrued, and before suit brought, bars the plaintiff of his right of entry thereafter, whether the ouster and adverse possession be by the same person or persons, for the whole term of fifteen years, or by different persons for different periods, making fifteen years in the whole; provided the disseisin and adverse possession have been continued and uninterrupted; and provided that the plaintiff does not come within any of the exceptions mentioned in the provisos of the Statute, extending the term of time, in which entry may be made.

*New trial not to be granted.*²

¹ BRAINERD and GRISWOLD, JJ., having been concerned as counsel in this cause, did not sit.

² "The only other question presented by the case is, whether the Statute of Limitation was a bar to the plaintiff's recovery. It appears that there was a continual adverse possession for more than twenty years, but that Hugh Shannon, who first took the possession of the land in controversy, before he had remained in possession twenty years surrendered the possession to the defendants or those under whom they held, in pursuance of a decree entered upon an award giving them the land in virtue of an adverse claim, and that they had not had the land in possession twenty years prior to the commencement of this suit.

"This circumstance, it is urged on the part of the plaintiff, prevents the Statute from operating as a bar to his recovery. But we cannot perceive any principle upon which it can have such an effect. According to the literal import of the Statute, the plaintiff could only enter upon the land within twenty years after his right of entry accrued, and, consequently, an adverse possession for that length of time will toll his right. Nor can it, in the reason and nature of the thing, produce any difference, whether the possession be held uniformly under one title or at different times under different titles, provided the claim of title be always adverse to that of the plaintiff, nor whether the possession be held by the same or a succession of individuals, provided the possession be a continued and uninterrupted one."—*Shannon v. Kinny*,

170
OVERFIELD v. CHRISTIE.

SUPREME COURT OF PENNSYLVANIA. 1821.

[Reported 7 S. & R. 178.]

ERROR to the Court of Common Pleas of Luzerne County, in an ejectment brought by Jacob Overfield against Jerusha Christie and Hugh Osterhout, in which there was a verdict and judgment for the defendants.

The plaintiff gave in evidence an application in the name of Samuel Lefevre, dated the 8d April, 1769, on which a survey was made 4th October, 1778, and a patent issued to Joseph Wharton, 17th August, 1784. On the 7th June, 1818, Joseph Wharton conveyed to the plaintiff, in consideration of 122 dollars, 50 cents.

The defendants claimed under Nathan Abbott, who made a settlement and improvement in 1788. Abbott sold his improvement to

1 A. K. Marsh. 8 (Ky., 1817); and see *Davis v. McArthur*, 78 N. C. 357 (1878); *Scales v. Cockrill*, 3 Head, 482 (Tenn., 1859); *Kipp v. Synod of Toronto*, 33 U. C. Q. B. 220 (1878).

"No privity of estate was shown, and if that was necessary, the evidence was improperly admitted. But it was not necessary. It is sufficient if there is an adverse possession continued uninterruptedly for fifteen years, whether by one or more persons. This was settled in *Fanning v. Willcox*, 8 Day, 258. Doubtless the possessions must be connected and continuous, so that the possession of the true owner shall not constructively intervene between them; but such continuity and connection may be effected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact. Such an agreement to sell and transfer of possession as were set up in this case, if proved, were sufficient." *Smith v. Chapin*, 31 Conn. 530, 531 (1868).

In *Sawyer v. Kendall*, 10 Cush. 241 (Mass. 1852), the court said: "The general rules of law respecting successive disseisins are well settled. To make a disseisin effectual to give title under it to a second disseisor, it must appear that the latter holds the estate under the first disseisor, so that the disseisin of one may be connected with that of the other. Separate successive disseisins do not aid one another, where several persons successively enter on land as disseisors, without any conveyance from one to another, or any privity of estate between them, other than that derived from the mere possession of the estate; their several consecutive possessions cannot be tacked, so as to make a continuity of disseisin, of sufficient length of time to bar the true owners of their right of entry. To sustain separate successive disseisins as constituting a continuous possession, and conferring a title upon the last disseisor, there must have been a privity of estate between the several successive disseisors. To create such privity, there must have existed, as between the different disseisors, in regard to the estate of which a title by disseisin is claimed, some such relation as that of ancestor and heir, grantor and grantee, or deviser and devisee. In such cases, the title acquired by disseisin passes by descent, deed, or devise. But if there is no such privity, upon the determination of the possession of each disseisor, the seisin of the true owner revives and is revested, and a new distinct disseisin is made by each successive disseisor." *Jackson d. Baldwin v. Leonard*, 9 Cow. 658 (N. Y. 1824); *Doe v. Brown*, 4 Ind. 143 (1853); *Doswell v. De La Lanza*, 20 How. 29, 32 (U. S. 1857); *Schrack v. Zubler*, 34 Pa. 38 (1859); *San Francisco v. Felde*, 87 Cal. 349 (1899); *Ryan v. Schwartz*, 94 Wis. 403 (1896); *Robinson v. Allison*, 124 Ala. 825 (1899); *Ely v. Brown*, 183 Ill. 575 (1900), accord.

Lazarus Ellis, who sold to Peter Osterhout, deceased, his son-in-law, the husband of Jerusha Christie (daughter of Ellis), one of the defendants, and father of the other defendant, Hugh Osterhout.

The defendants rested their defence on the Act of Limitations; to avoid which the plaintiff gave evidence tending to show that after the death of Osterhout, Mr. Overton, the attorney in fact of Joseph Wharton, was on the land in the year 1812 or 1813, and offered to sell it to the widow Christie (one of the defendants), who was then living on it, who said she was unable to purchase it, and that Mrs. Christie and the plaintiff about the time the plaintiff purchased of Overton, as attorney of Wharton, were in treaty concerning the sums which the plaintiff should pay to her as a compensation for the improvements made by her husband. These matters were submitted to the jury by the President of the Court of Common Pleas, who told them that in order to make defence under the Act of Limitations, it was necessary that there should have been a possession adverse to Wharton's for twenty-one years. The plaintiff contended also that the defendants could not avail themselves of the Act of Limitations, because the persons under whom they claimed were seated on the land under a title derived from the State of Connecticut, and that having shown no title under Pennsylvania, it was to be presumed that their title was under Connecticut. But the judge was of opinion that no such presumption ought to be made, because a settlement under a Connecticut title was *criminal* under the law of Pennsylvania. The judge's charge, which was excepted to by the plaintiff, was placed on the record, and the objections to it were now reduced to three points.

1. That there was error in saying "that it was incumbent on the plaintiff to prove that the defendants claimed under Connecticut."

2. That the judge ought to have instructed the jury that if the defendants entered *without color of title*, their adverse possession was not sufficient to bar the plaintiff from recovering.

3. That he ought to have charged that Nathan Abbott, having entered without title, was a trespasser, and so were all those who came after him; and consequently no continuity of possession, which is essential where one defends himself solely by the Act of Limitations.

Dyer and Hall, for the plaintiff in error.

Greenough, contra.

The opinion of the court was delivered by

TILGHMAN, C. J. 1. By the Act of Limitations, 26th March, 1785, no person can support an action to recover the possession of land unless he or the persons under whom he claims have had possession within twenty-one years next before the commencement of the suit. But in order to protect those persons who derived titles from the State of Pennsylvania against the unlawful possession of those who in contempt of the Government pretended to derive title from the State of Connecticut, it was enacted by the Act of 11th March, 1800, that the

Act of 26th March, 1785, "should be repealed, and have no effect within what was called the seventeen townships, in the County of Luzerne, nor in any case where title is or has at any time been claimed under what is called the Susquehanna Company, or in any way under the State of Connecticut, for any lands or possessions within this Commonwealth." The land for which this ejectment was brought does not lie within the seventeen townships, so that the case could only be affected by the defendants claiming under the Susquehanna Company or the State of Connecticut. But there is another Act of Assembly, passed the 25th March, 1813, to be taken into consideration, in order to form a judgment on this case; and from that Act it will appear that whether the defendants derived title under Connecticut or not, was of no importance as regarded the Act of Limitations. By this last-mentioned Act it is provided that in two years from the passing thereof the Act of 11th March, 1800, should be repealed, and the Act of 26th March, 1785 (the general Limitation Act), should, after the expiration of the said two years, be taken and construed to extend as fully and effectually to that part of the Commonwealth, against every person and persons whatsoever, *except those who shall have brought their action for the recovery of their possessions within the said period of two years*, as in any other parts of the same. The policy and intent of this Act are extremely clear. Before the passing of it, the Connecticut claimants had pretty generally submitted to the title under Pennsylvania, the Legislature having made very great and expensive efforts to effect a compromise between those who claimed under the two States. It was therefore thought prudent to restore full effect to the Act of Limitations in that part of the State to which the pretended title under Connecticut extended, taking care at the same time to do justice to the Pennsylvania claimants by allowing them ample time to bring their actions before the Act could attach against them; and for that purpose the period of two years was judged sufficient. Now the plaintiff's action was not commenced within two years, and therefore to him it was perfectly immaterial whether the defendants had claimed under Connecticut or not. It is unnecessary, then, to inquire whether the judge was right or wrong in saying that the law implied no presumption of a claim under Connecticut, the point being irrelevant. Even if the fact of such a claim had been conceded, the plaintiff would have been bound, not having brought his action within two years. I do not mean, however, to insinuate any doubt of the correctness of the charge on this point. I incline to think it was right.

2. I cannot perceive the force of the second objection. It grants the possession to be adverse, and yet calls for something more, — for some *color of title*. To be sure, if a man enters without pretence of title of any kind into land which he knows to be appropriated, there is considerable reason to suppose that he does not mean to deny the title of the owner, but merely to occupy the land, with an intent to become

a purchaser; especially if the owner lives at a distance. But this presumption may be rebutted by proof that he set the owner at defiance. Whether Abbott knew of the survey on Lefevre's application, when he first settled, does not appear. If he did not, he no doubt intended to hold for himself against the world. I think, however, that the judge put that matter fairly to the jury, upon the fact, of *adverse possession or not*.

3. As to privity between trespassers. If one enters and commits a trespass, and then goes off, and another comes after him, and commits a trespass, I grant that there is no privity between these persons, nor can the possession be said to be transferred and continued from one to the other.¹ But I cannot see that the present case falls within that principle. Here has been a possession of four or five and twenty years, transferred in the two first instances for a valuable consideration, and finally transferred from father to son. Each new possessor has been substantially connected with his predecessor. The law pays great regard to a possession transmitted from father to son; so great, indeed, that where there was a *disseisin* and a *descent* to the heir of the disseisor, the entry of the disseisee was at common law taken away. Lord Mansfield has told us that of *seisin* and *disseisin* very little was known in his time *but the name*. In Pennsylvania we certainly have not been in the habit of going deeply into that antiquated subject; nor is it material to inquire whether Abbott or those who came after him acquired a *seisin* according to the strict import of the term. Our law permits all persons, whether in or out of *seisin* or possession, to transfer their claim, such as it is, good or bad, by deed or will. And I have no manner of doubt that one who enters as a trespasser, clears land, builds a house, and lives in it, acquires *something which he may transfer to another*; and if the possession of the two added together, amounts to twenty-one years, and was *adverse to him who had the legal title*, the Act of Limitations will be a bar to his recovery. It would be extraordinary indeed if a possession acquired without force could not be transferred, when we hold that *prior possession alone is good title to recover in ejectment* against all but him who shows better title. But when possession has been continued for a number of years, and has passed from hand to hand for valuable consideration, or by descent from parent to child, it has something respectable in it. The argument of the plaintiff leads plainly to this consequence,—that the Act of Limitations can never take effect in favor of a defective title, unless one man lives twenty-one years; because every one who enters under a defective title is a trespasser, and being a trespasser, he cannot, according to the doctrine contended for, transfer his possession to another, or even transmit it by descent to his heir, so as to make a connected continued possession. If that be the case, there is little use in the Act of Limitations. But I

¹ See *Agency Co. v. Short*, 13 Ap. Cas. 793 (1888); *Pittsburgh, Ft. Wayne & Chicago Railway v. Post*, 152 Pa. 486 (1893).

am decidedly of opinion that the law is not so, and that it was well laid down in the charge of the Court of Common Pleas. The judgment should therefore be affirmed. *Judgment affirmed.*¹

ERCK v. CHURCH.

SUPREME COURT OF TENNESSEE. 1889.

[Reported 87 Tenn. 575.]

APPEAL from Chancery Court of Shelby County. B. M. ESTES, Ch. Ejectment bill. Decree for complainant. Defendant appealed.

J. M. Gregory, for complainant.

Gantt & Patterson, for defendant.

J. M. DICKINSON, Sp. J. Complainant filed this bill September 25, 1886, to recover possession of a parcel of land in Memphis, fronting three feet and ten inches on Lauderdale Street, and five feet seven and one-half inches on Humphries Street, being three hundred and nine feet in length.

It is admitted that complainant has a good legal title, and that he has a right to recover, unless it has been defeated by the operation of the statute of limitations.

Mackall sold and deeded to Warner a lot contiguous to the parcel in dispute, fronting fifty feet on Lauderdale Street, and the same width on Humphries Street, bounded by parallel lines. In taking possession Warner did not measure his fifty feet. Mackall, at the time Warner purchased, pointed to a group of trees, and designated one as being on the south boundary line of the lot sold. Warner fenced in his purchase, and placed his south fence along the line indicated, believing that he was inclosing the parcel purchased of Mackall and no more. He, in fact, inclosed with his fifty foot lot the parcel in dispute, and from that time continued to hold as his own the entire tract included by his fences.

Warner sold to defendant Church by deed, following the description in the deed from Mackall to him, which embraced the fifty feet, but not the parcel in dispute, and Church took possession of the whole tract as inclosed by Warner, and held it as his own.

It is admitted that Church has not held seven years, but that Warner and Church together have held more than seven years. Complainant contends that the statute of limitations has not operated for these reasons :

First. That Warner did not intend to inclose any ground but the fifty feet he purchased ; that he took possession of and held the disputed

¹ In South Carolina it has been held that an heir can tack his possession, *Williams v. McAliley*, Chev. 200 (1840) ; but that a purchaser cannot, *King v. Smith, Rice*, 10 (1838).

See *Haynes v. Boardman*, 119 Mass. 414 (1876) ; *Vance v. Wood*, 22 Or. 77 (1892).

parcel by mistake, and that, therefore, the statute was not set in motion because an essential requisite, namely, an intention to hold adversely, did not exist.

Second. That the periods of possession by Warner and Church cannot be connected, because they are both wrong-doers, and there is no privity between them.¹

A leading case in this State, and one frequently cited by judges and text-writers, is *Marr v. Gilliam*, 1 Cold. 491. The point, actually decided, was that the possession of one who had entered lawfully upon land by deed as a tenant in common, but who subsequently began to hold adversely to the other tenants in common, might be connected with that of his heirs so as to make out the period of the statute, because there is a privity of estate between ancestor and heir, but that the wife of such first possessor could not connect her possession with his because there was no such privity between husband and wife. Judge Wright (page 504) thus states the law, "Separate successive disseizins do not aid one another, where several persons successively enter on land as disseizors, without any conveyance from one to another, or any privity of estate between them, other than that derived from the mere possession of the estate. Their several consecutive possessions cannot be tacked, so as to make a continuity of disseizins of sufficient length of time to bar the true owners of their right of entry."

On pages 509-10 Judge Wright discusses the cases of *Wallace v. Hannum*, 1 Hum. 443; *Norris v. Ellis*, 7 Hum. 463, and *Crutinger v. Catron*, 10 Hum. 24, and criticises as *dicta* the statements in those opinions, that a trespasser by mere possession, without color of titles, acquires no right that is either alienable or descendible. As previously stated, Judge Nicholson, in *Baker v. Hale*, 6 Baxt. 48, says: "It is settled by repeated adjudications in this State that the successive possessions of trespassers cannot be so connected as to make up the bar of seven years under the second section of the Act of 1819, and for the reason that there can be no privity between wrong-doers." In this case he reviews *Marr v. Gilliam*. On page 51 he apparently approves the statement of the law as made by Judge Wright, to the effect that successive possessions of trespassers may be tacked together where the successive possessors hold the land as their own, and there is a privity of estate between them. On the next page, however, he says that the possessory right of a naked trespasser is not descendible or alienable. This is clearly in conflict with the position of Judge Wright. In neither case, however, was the law, as stated, called for. Thus we have conflicting declarations of the law from eminent judges, but none of them are stamped with the authority of an adjudged case.

In Wait's Action and Defences the following is stated to be the law: "When there are several successive adverse occupants of real property, the last one may tack the possession of his predecessor to his

¹ The opinion of the court on this first question is omitted and only a portion of the opinion on the second question is given.

so as to make a continuous adverse possession for the time required by the statute, provided there is a privity of possession between such occupants; and in case of an actual adverse possession, such privity arises from a parol bargain and sale of the possession of the premises followed by delivery thereof, as well as by a formal conveyance from one occupant to the other." Vol. 6, p. 455, and the cases there cited.

In *Weber v. Anderson*, 73 Ill. 489, the facts presented a case involving almost every essential element embodied in the case under consideration. The instruction in the lower court to the jury was that the rights acquired by the first possessor could not be transmitted except by deed. The case was reversed, the superior court saying that there was "parol proof" showing the Plank Road Company transferred "their possessions over to him" (the defendant). It was held that parol proof was sufficient to show the transfer of possession, and that it could be tacked to the subsequent holding. It does not clearly appear in that case whether or not there was an actual transfer of a possessory right by parol. The language of the Court would admit of this construction. If, however, the possession merely passed as in the case under consideration, *sub silentio*, without any knowledge by either party that there was such a possessory right, and that it was being transferred, then the case is an extreme one.

The opposite conclusion was reached under a similar state of facts by the Supreme Court of Wisconsin in *Graeven v. Deviss*, 31 N. W. R. 914.

In *Fanning v. Willcox*, 3 Day (Conn.), 258, the rule (as quoted by Wood on Limitations, p. 582, note) is thus stated: "Doubtless the possessions must be connected and continuous, so that the possession of the true owner shall not constructively intervene between them; but such continuity and connection may be effected by any conveyance, agreement, or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact."

This is in substantial accord with the doctrine as stated by Judge Wright in *Marr v. Gilliam*, which is approved by us. There must be a privity of estate connecting the successive possessions, and a transfer of the possessory right, by grant, inheritance, devise, or contract, verbal or written. The mere fact of successive possessions appearing, and nothing more, will not constitute such privity. If the contrary rule were adopted, then any independent trespasser entering upon land simultaneously with the abandonment of it by a prior trespasser could connect the two possessions, without any pretence of a privity of estate, by merely showing that there had been no actual *hiatus* between the possessions.

The deed to Church does not embrace the land in dispute, and there is no evidence that Warner undertook to transfer to Church his possessory right to it. On the contrary, it is shown that he was ignorant of having such right. There is no privity of estate between them in

respect to this land. Warner both acquired and abandoned his possessory right in ignorance of its existence. The entry by Church was a new disseizin, and a new period of limitation began.

The decree of the Chancellor is affirmed.

WISHART v. McKNIGHT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901.

[Reported 178 Mass. 856.]

WRIT OF ENTRY to recover a strip of land ten feet wide lying on the westerly side of the demandant's dwelling-house on Pond Court in the town of Clinton. Writ dated July 20, 1897.

The tenant had occupied the demanded premises for many years, but less than twenty years, and to the demandant's writ pleaded title to the demanded premises. The plan on the [following] page was copied from a plan used at the trial and at the argument before this court.

At the trial in the Superior Court, before *Fessenden, J.*, the demandant put in evidence deeds which showed that he held the record title to the land demanded. The tenant offered in evidence certain deeds under which he claimed title, through mesne conveyances, from one William Speakman under a deed from Hannah Speakman's executor, dated January 10, 1874.

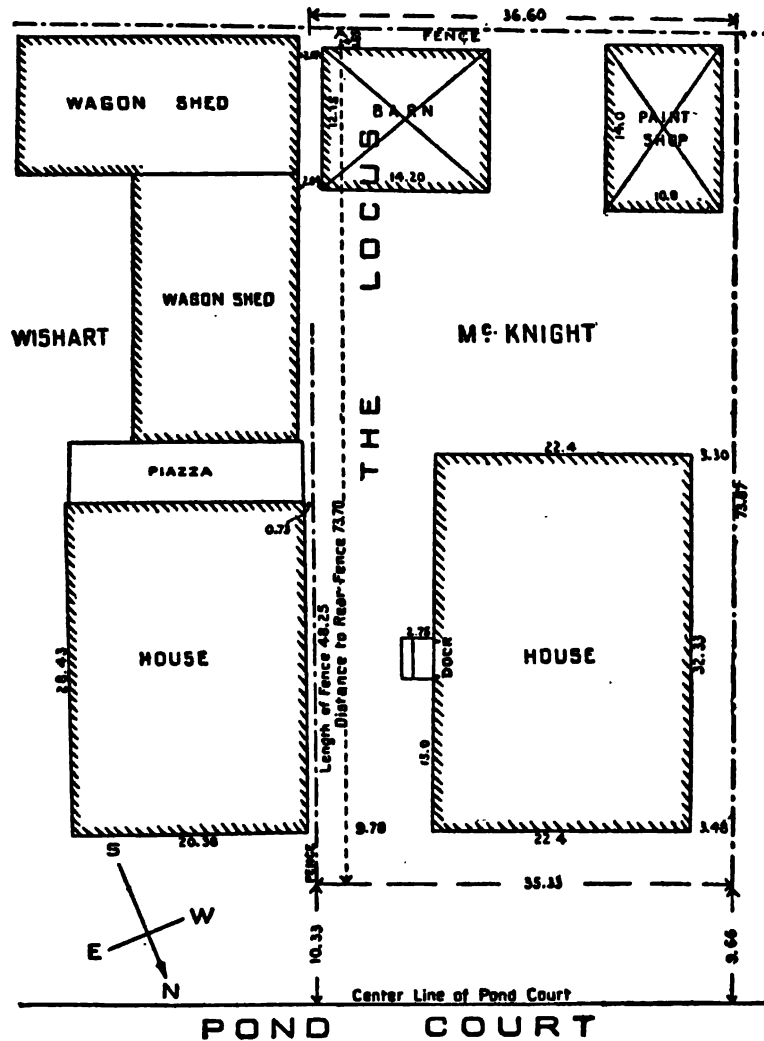
The tenant offered evidence tending to show that his predecessors in title, successively the grantees under the Speakman deed and mesne conveyances, had occupied the demanded premises which adjoined the land conveyed by the terms of the deed and mesne conveyances; and further offered to show that a fence had been maintained by himself and his predecessors in title, enclosing the demanded premises as part and parcel of the premises and dwelling occupied by the tenant and his predecessors; and that this fence had been thus maintained for a period of more than twenty years before the bringing of demandant's writ. That no one of his predecessors, nor the tenant himself, had alone occupied for any continuous period of twenty years the land to which they thus claimed title.

It was agreed that the demanded premises were not covered by any word or any terms of description in any of the deeds, through or under which the tenant claimed title.

The judge thereupon excluded the evidence offered, but admitted evidence offered by the tenant tending to show, that a door appearing upon the side of the tenant's house, as shown by the photograph used at the trial, had existed as it there appeared for a period of more than twenty years before the bringing of the demandant's writ. To the exclusion of the other evidence offered by the tenant the tenant excepted. The photograph is not reproduced, but the situation of the door, with

steps extending from it into the locus, is shown on the copy of the plan.

The demandant's deeds, which were put in evidence, showed that his predecessors in title had the record title by specific description in those



deeds to the demanded premises prior to any conveyance of the estate now owned by the tenant to any of the tenant's predecessors who had occupied the demanded premises.

The judge found for the demandant; and the tenant alleged exceptions.

The case was submitted on briefs to all the justices.

J. W. Corcoran & W. B. Sullivan, (A. G. Buttrick with them,) for the tenant.

H. Parker & H. H. Fuller, for the demandant.

LORING, J. It appears from the photograph and plan made a part of the bill of exceptions that the demanded premises consist of a strip of land ten feet wide between the dwelling-houses of the demandant and of the tenant, running from Pond Court, on which those houses front, to the rear line of the lots; that the rear of the locus is covered by a barn, used and occupied by the tenant, which is in part on the locus and in part on the land to which the tenant, without question, has a good title; and further, that the tenant's only access by wagon to the barn is over the locus, his dwelling-house being within three and a half feet of the other, that is, the westerly, side line of his lot. From the deeds put in evidence, it appeared that the record title to the locus was in the demandant. The tenant introduced in evidence various deeds covering the land on which his dwelling-house stands, but not covering the ten-foot strip in question, the first of these deeds being dated January, 1874; he offered to show that for twenty years prior to the date of the writ, July 20, 1897, each of the grantees in said deeds had occupied the demanded premises and had maintained a fence enclosing them as part and parcel of the premises and dwelling-house occupied by them. It was admitted that no one of these grantees had occupied the locus for a continuous period of twenty years, and that the locus was not covered by the description of the land contained in any of these deeds. This evidence was excluded, against the exception of the tenant, and the court found for the demandant. This evidence would have warranted the jury in finding that each of the grantees transferred to his successor his possession of the strip of land in question, and that thereby the demandant was continuously kept out of possession.

The ruling in the court below evidently was made on the authority of *Sawyer v. Kendall*, 10 Cush. 241, following dicta in the previous cases of *Ward v. Bartholomew*, 6 Pick. 409, 415, *Allen v. Holton*, 20 Pick. 458, 465, *Melvin v. Proprietors of Locks & Canals*, 5 Met. 15, 32, and *Wade v. Lindsey*, 6 Met. 407, 413, cited in that case.

Where possession has been actually, and in each instance, transferred by the one in possession to his successor, the owner of the record title is barred from maintaining an action to recover the land.

In some cases this conclusion has been reached on the ground that in such a case there is the necessary privity or continuity of possession between the successive trespassers within the doctrine on which *Sawyer v. Kendall* was decided. *Weber v. Anderson*, 73 Ill. 439; *Fuloon v. Seinshauer*, 130 Ill. 649; *Smith v. Chapin*, 31 Conn. 530; *Schrack v. Zubler*, 34 Penn. St. 38; *Chilton v. Wilson*, 9 Humph. 399, 405; *Vandall v. St. Martin*, 42 Minn. 163; *Crispen v. Hannavan*, 50 Mo. 536; *Adkins v. Tomlinson*, 121 Mo. 487, 494; *Coogler v. Rogers*, 25 Fla. 853, 882; *Rowland v. Williams*, 23 Or. 515; *Shuffleton v. Nelson*, 2 Sawyer, 540; *Winn v. Wilhite*, 5 J. J. Marsh. 521, 524.

There are other cases which reach the same result by a different road. These cases go on the ground that the position of a tenant, who seeks to make out the defence of the statute of limitations by proving the possession of a succession of persons, is not like that of one who seeks to establish an easement by showing that a succession of persons had prescribed for it. These cases hold that in case of the defence of the statute of limitations the only question is, whether the demandant has been kept out of possession continuously for the legal time, not whether the persons who kept him out of possession held one under the other. *Carter v. Barnard*, 13 Q. B. 945, 952; *Dixon v. Gayfere*, 17 Beav. 421, 430; *Willies v. Howe*, [1893] 2 Ch. 545, 553; *Fanning v. Wilcox*, 3 Day, 258; *McNeely v. Langan*, 22 Ohio St. 32; *Shannon v. Kinney*, 1 A. K. Marsh. 3; *Scheetz v. Fitzwater*, 5 Penn. St. 126. And see *Chapin v. Freeland*, 142 Mass. 383, 387; *Harrison v. Dolan*, 172 Mass. 395, 397.

Where possession of land has been held for the statutory period by successive disseisors or trespassers, the defence of the statute is not made out if the possession has not been continuous, because where a disseisor in fact abandons his possession and leaves the land vacant, the seisin of the true owner reverts; there is a new departure from that time, and the owner can rely on his new seisin by reverter as the ground of an action within the statutory period. *Agency Co. v. Short*, 13 App. Cas. 793; *Solling v. Broughton*, [1893] A. C. 556, 561; *Cunningham v. Patton*, 6 Penn. St. 355, 358, 359; *Louisville & Nashville Railroad v. Philyaw*, 88 Ala. 264, 268; *Jarrett v. Stevens*, 36 W. Va. 445, 450.

In *Sawyer v. Kendall* the lot in controversy had been set off to the grantor of the demandant, and the lot next to it to the tenant, in the partition of their father's estate made by commissioners duly appointed. The premises in controversy and the parcel of land set to the tenant were then enclosed by one fence, and so remained until the lot in controversy was conveyed to the demandant. He put up a fence between the two lots and brought the writ of entry to recover possession of his lot in the same month in which it was conveyed to him, namely in March, 1848. Both lots "were mostly used as pasture land, and were approached in two ways, both of which led across the latter [the demanded premises]. The tenant proved that during the life of her husband the premises in dispute, and the parcel set to her, had been used by him, and since his death by her, by turning cattle into the parcel set to the tenant; and that they thence went into and depastured the tract in controversy. It also appeared that the tenant had gathered apples from the trees on the latter place, and driven cattle over and across the same. This use, as aforesaid, was exercised by the husband of the tenant from 1820 till 1832, and from that time till the date of the writ, by the tenant herself; more than thirty years in the whole."

Sawyer v. Kendall, therefore, was a case where no continuity of possession had been made out by the tenant, and the decision was finally

put upon that ground. After stating that during her coverture the tenant could commit no act of disseisin, and that until the death of her husband he was in possession by his own act of disseisin, the opinion is as follows: "She shows no deed or devise of the land to herself by her husband. Upon his death, therefore, the seisin was in his heir at law, or the seisin of the true owner revived, and the subsequent disseisin by her was her own separate act, unconnected with the previous disseisin of her husband."

It would be going very far to hold that the possession of the husband and that of his wife after his decease were continuous, where the only act relied on to make out adverse possession consists in turning out on the tenant's land cows which stray thence on to the land in controversy, — there being no fence between the two, — supplemented by an occasional gathering of apples from the demandant's land. *Sawyer v. Kendall* went no farther than that.

We are of opinion that that case is to be confined to the point actually decided, and cannot be held to be an authority for all the statements in the opinions in that case and in the cases cited.

Where a trespasser in possession of land actually transfers his possession to another, or where one disseisor is disseised by another, it is not true, as was held in *Potts v. Gilbert*, 3 Wash. C. C. 475, that there is in contemplation of law of necessity a momentary reverter of seisin to the true owner, for the reason that a trespasser or a disseisor has nothing which he can transfer to another. *Potts v. Gilbert* was a decision of the Circuit Court of the United States sitting to try an action of ejectment to recover land in the State of Pennsylvania; the decision was promptly repudiated by the Supreme Court of that State in *Overfield v. Christie*, 7 S. & R. 173, and had ceased to be an authority when first cited in this Commonwealth in *Allen v. Holton*, 20 Pick 458. See also the subsequent cases of *Scheetz v. Fitzwater*, 5 Penn. St. 126, 131; *Moore v. Small*, 9 Penn. St. 194, 196. It is settled that one who has the possession of land is thereby invested with a right to that land which, in the absence of a better title, will be enforced by law; *Slater v. Rawson*, 6 Met. 439; *Hubbard v. Little*, 9 Cush. 475; *Currier v. Gale*, 9 Allen, 522; Pollock & Wright on Possession, 95-98; and this possession and the right arising out of it may be transferred *in pais* to another.

Exceptions sustained.

F. *Disabilities.*

GRISWOLD v. BUTLER.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1820.

[Reported 8 Conn. 227.]

BRISTOL, J.¹ . . . Let it, then, be assumed, that Hezekiah Griswold was disseised in 1798; that he was then *non compos mentis*, and so continued till his death in 1802; that Mercy Weller, on whom the descent was cast, was also *non compos mentis*, and so continued until her death in 1817; and that this action was brought, by Elijah Griswold, her heir, within five years after her death; the plaintiff is still barred of a recovery. To raise this question we must assume the fact, that Hezekiah Griswold was disseised in 1792; and that the possession of the defendant and others, since that time, has been adverse to the title of Hezekiah Griswold and his heirs; for if the possession has not been adverse, but held under Hezekiah Griswold, without any claim or title in the occupants, no possession, however long, will acquire a title.

It has been urged, that the disability of Hezekiah Griswold and his heir was *one continued disability*; that the circumstance of Hezekiah Griswold's death makes no difference; but the case stands on the same ground as if Hezekiah Griswold had lived until 1817, when his heir would have an undoubted right of entry for five years; that the case does not compare with one where there occur two different disabilities in the same person, which cannot be tacked; but that this is the farthest to which any adjudged case has extended; that the statute was intended to punish the negligent owner, by a forfeiture of his title, and it would be an extremely harsh construction to apply the statute in a case, where, during the whole time of the disseisin, the true owners had never been competent for a single moment, to assert their title.

In reply to this reasoning, let it be remarked, that the question depends on the *true meaning* of the statute; and the best mode of ascertaining that meaning, is, to examine the language made use of, and derive the meaning from the language, instead of arbitrarily fixing that meaning, in the first place, and then endeavoring so to *construe* the language as to make it conform to the standard previously set up. It is unfortunate that certain phraseology, in frequent use on this subject, was ever adopted; such as, "that the statute never operates, where there has been no *laches*," that "it never runs against persons who are under a disability;" &c., &c. This language, without conveying any definite ideas, had nearly frittered away a most useful statute, until Judge Smith, in the case of *Bush v. Bradley*, 4 Day, 298, instead of adopting this legal jargon, recalled our attention to the language of the

¹ The statement of facts is omitted, and only a portion of the opinion of one of the judges is given.

act, and endeavored to ascertain its meaning, not by attributing certain motives to the legislature, and then twisting the language so as to make it conform, but by learning the meaning and intention of the legislature from the language made use of; which is the only safe mode of determining what the legislature intended. The accuracy of this language is also denied, by Judge Swift, in the case of *Bunce & al. v. Wolcott*, 2 Conn. Rep. 27. "Nor," says he "is the proposition correct, that the statute never begins to run, against a person under a disability. Suppose that the party claiming is an infant, when the title accrues; if fifteen years run during his infancy, he has but five years, after he comes of full age, to make his entry. This clearly shows, that the statute operates against him during the disability. Indeed, the statute always begins to run against a man, the moment he is disseised, whether he is under a disability, or not."

We may now take it for granted, in conformity to the language of the statute, and the unanimous opinion of the court of errors, in the case of *Bunce & al. v. Wolcott*, that the statute began to run, the moment Hezekiah Griswold was disseised, whether under disability, or not; and more than fifteen years having elapsed since that disseisin, the rights of his heirs are lost, unless those rights are saved by the proviso: for it is too clear to admit of argument, that, had the statute contained *no proviso*, the interest of all persons, whether under disability, or not, would be destroyed, by an adverse possession of fifteen years.

Does the proviso, then, save the right of the present plaintiff, and permit him to assert it, at any time, within five years, not from the death of Hezekiah Griswold, to whom the right of entry first accrued, but from the death of Mercy Weller? If the present plaintiff can enter within five years, after *her* death, if *he* should be under a disability during his life, *his heirs* will have the same right to enter within five years from *his* death; and so different successive disabilities might be extended to an indefinite period. Such was not the intention of the legislature. The saving of the statute relates solely to disabilities existing at the time when the right of entry first accrued. *Bush & al. v. Bradley*, 4 Day 298. *Bunce & al. v. Wolcott*, 2 Conn. Rep. 27. *Stowel v. Lord Zouch*, 1 Plowd, 353. *Doe d. George & al. v. Jesson*, 6 East 80. *Eager & ux v. The Commonwealth*, 4 Mass. Rep. 182. It does not provide a remedy for subsequent disabilities, even in the person to whom the right of entry does first accrue. For if an infant of the age of six years is disseised, and before arriving at full age, marries, and continues under coverture, without asserting her title, more than five years after she attains to full age, her title is barred; and if, instead of marrying, she had been visited with insanity, before she arrived at full age, and continued insane, during the whole five years after, her title would be also lost; for we have seen, that whether a supervenient disability be voluntary or involuntary, makes no difference; and the reason is, that no disability is provided for, or saved, except *the same disability*, which existed when the right

of entry *first* accrued. And an entry must be made within five years after *that* disability ceases to exist, whether any other disability has been superadded or not, provided more than fifteen years have elapsed from the time of the disseisin.

The saving of the statute, therefore, relates to the disability of Hezekiah Griswold, to whom the right of entry first accrued. Had his disability been removed, during his life, and he become of sound mind, he must have entered within five years, to protect himself from the operation of the statute.

Must not his heirs enter within five years from his death, in the same manner, that he must have entered within five years after the removal of his disability? And this, whether the heirs are under disability, or not?

The fourth section of the statute in question, after providing a saving for the disabilities existing when the title accrues, proceeds to *annex a limitation* to the rights saved, and to prescribe the time *within which*, and *by whom*, those rights shall be exercised. "So as such person or persons, or his or their heirs, shall, within five years next after his or their full age, discoverture, or coming of sound mind, enlargement out of prison, or coming into this country of New-England, or territory of New-York, or death, take benefit of, and sue forth the same, and at no time after the said five years:" That is to say, "take benefit" of an entry, or "sue forth" an action to recover the land.

This language is susceptible of one construction, and one only, when taken in connection with the other parts of the statute. It is this: that such person or persons, who were owners of the land, at the time the right of entry first accrued, or at the time of the disseisin, if then laboring under the disability of *infancy*, should have five years, after he or they became of full age; if under coverture, should have five years from the time they become discovert; if beyond seas, should have five years after their return; and if *non compos mentis*, should have five years after they became of sound mind: but as these disabilities might *never* be removed, but continue until *death*; that the *heirs* of such disabled persons, who died under the same disability which existed when their title accrued, should also have five years from the death of the disabled ancestor, to make their entry, or bring their action to recover the land. There is no saving for any disability in the *heirs* of the person to whom the right of entry first accrues, any more, than for supervenient disabilities in the same person; but the clause in question constitutes as absolute a bar to the heirs of a disabled person, who do not enter within five years after his death, as fifteen years adverse possession would be to every person, whether under disability or not, had the statute contained no proviso. It is true, that upon this construction of the statute, the person first disseised may labor under a disability, and die leaving heirs under similar disabilities; and a good title be lost, without *laches* in the owners. So, if an infant is disseised, and marries under twenty-one years of age, and continues under cover-

ture more than five years, after attaining her full age, without asserting her rights, her title is lost, and that without *laches*; but if marrying under twenty-one, is to be accounted her own folly (though her minority must protect her from this imputation) if at the age of twenty she becomes *non compos*, and does not bring her action, or make her entry, within five years after she is of full age, she is also barred; and that without any imputation of *laches* or folly. Where, then, is the distinction between the hardship of the present case, and that which existed in the case of *Bunce v. Wolcott*, and many other cases? The necessity of protecting long and peaceable possession of land is much more urgent, than any considerations resulting from the pretended hardship of the rule: and if this rule is not adopted, but the saving of the statute, instead of being confined to disabilities existing at the time of the disseisin, is to be extended to successive disabilities in the heirs of the person first disseised, there is no telling to how long a period they may extend, or how much evil such a construction would entail on the community. Every reason, which can be urged against admitting supervenient disabilities in the same person, to protect his title, equally applies to the present case; for although some supervenient disabilities may be voluntary, and others not so; yet, as I have already remarked, the distinction between them is exploded.

There is no substantial difference between the case of *Bunce v. Wolcott*, before cited, and the present. In that case, the court decided, that the saving of the statute applied only to such disabilities as existed at the time when the right of entry first accrued; which, they said, was at the time when the owner was first disseised, and not to any supervenient disabilities; and although a disability in the heir of a person disabled, is not properly a supervenient disability, yet it falls within the same reason; and what is more conclusive, the statute declares, that if the person first disseised is under a disability, and dies before it is removed, his heirs shall have five years from his death to make their entry; and if they suffer this time to pass, they are barred, whether under a disability or not.¹

¹ The statutes of limitation ordinarily do not enlarge the period within which the true owner may make entry or bring action except on account of disabilities affecting the owner at the time his right first accrued. *Allis v. Moore*, 2 All. 306 (Mass. 1861).

This is true even though the owner has passed under a second disability before being freed from the first. *Bunce v. Wolcott*, 2 Conn. 27 (1816); *Demarest v. Wynkoop*, 3 Johns. Ch. 129 (N. Y. 1817); *Mercer v. Selden*, 1 How. 37 (U. S. 1843).

The rights of the heirs of the owner are not enlarged on account of any disabilities affecting them. *Seawell v. Bunch*, 6 Jones 196 (N. C. 1858); *Fleming v. Griswold*, 3 Hill 85 (N. Y. 1842). *Rose v. Daniel*, 3 Brev. 488 (So. Car. 1814), *contra*.

This is true even though their ancestor was under a disability at the time his right first accrued and remained under that disability until his death. *Griswold v. Butler*, *ut supra*; *Thorpe v. Raymond*, 16 How. 247 (U. S. 1858).

SECTION II.

PRESCRIPTION.

NOTE. — Several of the earlier cases on Prescription are reported only in Serjeant Williams's note to *Yard v. Ford*, 2 Wms. Saund. 172, 175, as follows: "In *Lewis v. Price*, Worcester Spring Assizes, 1761, which was an action on the case for stopping and obstructing the plaintiff's lights, WILMOT, J., said, that where a house has been built forty years, and has had lights at the end of it, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption that there was originally *some agreement* between the parties; and he said that *twenty years is sufficient to give a man a title in ejectment*, on which he may recover the house itself; and he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house. So in an action on the case for stopping up ancient lights, the defendant attempted to show that the lights did not exist more than sixty years; WILMOT, C. J., said, that if a man has been in possession of a house with lights, belonging to it for fifty or sixty years, no man can stop up those lights: possession for such a length of time amounts to a grant of the liberty of making them; it is evidence of an agreement to make them. If I am in possession of an estate for so long a period as sixty years, I cannot be disturbed even by a writ of right, the highest writ in the law. If my possession of the *house* cannot be disturbed, shall I be disturbed in my *lights*? It would be absurd. But the action can only be maintained for damages so far as the lights originally extended, and not for an increase of light by enlarging the windows recently; and I should think a much shorter time than sixty years might be sufficient; but here there has been a possession of that time. *Dougal v. Wilson*, Sittings C. B. Trin. 9 Geo. 3. So in an action on the case for obstructing a way, the plaintiff proved that F. was seized of the plaintiff's tenement and the defendant's close, and in 1753, conveyed the tenement to the plaintiff *with all ways therewith used*, and that this way had been used with the tenement as far back as memory could go. The defendant produced a subsisting lease from F. for three lives made in 1723, by which F. demised the field in question in as ample a manner as one R. a former tenant held it, and in the lease there was no exception of a way over the close. YATES, J., held that by the lease without any reservation the way was gone, and therefore could not pass under the words *all ways*; but as thirty years had intervened between the defendant's lease and the plaintiff's conveyance, *and the way had been used all the time*, that was sufficient to afford a *presumption of a grant or license* from the defendant so as to make it a way lawfully used at the time of the plaintiff's conveyance, and then the words of reference would operate upon it, and the way would pass. Bull. Nis. Pri. 74, *Keymer v. Summers*. If *trespass* be brought against a person for using a way under similar circumstances, as he cannot *prescribe* for the way, he must justify under a non-existing *grant*, and so excuse a *profert*. As where in *trespass quare clausum fregit* in B., the defendant justified under a grant of a right of way over B. by a deed lost by time and accident; and on issue joined on a traverse of the grant, it appeared in evidence that the way had been used *adversely*, and not by leave and favor, for twenty years and more, over the close B. Which adverse user of the way for so long a period, the learned judge at the trial thought sufficient to leave to the jury to presume a grant; and the Court of K. B. on a motion for a new trial confirmed his opinion. 3 East, 294, *Campbell v. Wilson*. This is a strong case: for the grant must be presumed to have been made within twenty-six years, because at that time all former ways had been extinguished by the operation of an Enclosure Act. So in an action on the case for obstructing the plaintiff's lights, who proved an uninterrupted possession of

them for twenty-five years past : *Gould, J.*, who tried the cause, then called upon the defendant to show if he could answer this, because, if unanswered, he thought it sufficient to establish the plaintiff's case. The defendant upon this offered a grant from the former owner of the defendant's premises to the plaintiff's predecessor, dated June, 1750, by which he granted him liberty to put out a particular window, and argued that having this grant and no other, it must be presumed that the plaintiff never had any other, and this would be an answer to the presumption arising from length of possession. The judge thought the grant would not alter the case, as it related to a particular window, which was not included in the present action, and no exception of any other, or reference was mentioned in the grant. The defendant then relied on the possession previous to these twenty-five years ; but the judge said that would not avail them ; he thought twenty years' possession unanswered was sufficient, and if the defendant had any evidence to explain the possession within twenty years, to show it was limited, or modified, or bad in its commencement, that would be material ; the defendant offered none such, and there was a verdict for the plaintiff ; the judge however reserved the point of law if the defendant thought fit to move the court. Afterwards a rule to show cause why there should not be a new trial was obtained on the ground of a misdirection ; because the judge told the jury that so long an enjoyment was sufficient to give the plaintiff a right to them, although the defendant offered to prove that there were no lights there previous to that time ; but that this evidence was not received : and the counsel for the rule insisted that the judge had called the twenty-five years' possession an absolute bar, incapable of being overturned by any contrary proof, where it was only a presumptive proof which might be explained away ; that it was a matter of fact for the jury, but the judge left nothing to the jury, treating it as a matter of law. *LORD MANSFIELD.* I think there must be some mistake in the statement of what passed at the trial ; the enjoyment of lights, with the defendant's acquiescence for twenty years, is such decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the jury ought to believe it ; but it is impossible that length of time can be said to be an *absolute bar*, like a Statute of Limitation ; it is certainly a *presumptive bar* which ought to go to a jury. Thus in the case of a bond, there is no Statute of Limitations that bars an action upon it, but there is a time when a jury may presume the debt to be discharged, as if no interest appear to have been paid for sixteen or twenty years. The same rule prevails in the case of a highway. Time immemorial itself is only presumptive evidence ; for so it was held in the case of the *Mayor of Kingston upon Hull v. Horner*, Cowp. 102. In a case before me at Maidstone, I held length of time, when unanswered and unexplained, to be a bar. *WILLES, J.* There was a case before me at York where I held uninterrupted possession of a pew for twenty years to be presumptive evidence merely, and that opinion was afterwards confirmed in the Court of Common Pleas. *ASHHURST, J.* I should have thought it was the duty of the counsel for the defendant to have told the judge that this evidence was only a presumptive, not an absolute bar ; (to which it was answered by Coke, of counsel for the defendant, that it was so, and a case was cited where forty years were held not to be an absolute bar.) *BULLER, J.* I incline very much to think that the judge was misunderstood, for he could never call it an absolute bar. In the *Wells Harbor Case* this court went fully into the doctrine, and the rule of law is clear, that length of time is presumptive evidence only. The judge said, 'I think twenty years' uninterrupted possession of these windows, is a sufficient *right* for the plaintiff's enjoyment of them.' Now that expression is open to a double construction. If the judge meant it was an absolute bar, he was certainly wrong ; if only as a presumptive bar, he was right. The court seemed much inclined to discharge the rule, but the counsel for the defendant pressing it much, it was made absolute. However, the next day *BULLER, J.*, said that *ASHHURST, J.*, had waited on *MR. JUSTICE GOULD*, who said he never had an idea but it was a question for a jury ; and would have left it to the jury, if the counsel for the defendant had asked it ; that he compared it to the case of trover, where a demand and refusal are evidence of, but not an actual conversion. *Rule discharged. Darwin v. Upton*, Mich. 26 Geo. 3, K. B."

"In an action on the case, *Stansell v. Jollard*, B. R. Trin. 43 Geo., III., MS., *Lawrence*, J., for digging so near the gable-end of the house of the plaintiff, let to a tenant, that it fell; LORD ELLENBOROUGH held, that where, as in the case before the court, a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights, &c., he had acquired a right to a support, or as it were of leaning to his neighbor's soil, so that his neighbor could not dig so near as to remove the support; but that it was otherwise of a house, &c., newly built." — 1 Selw. N. P. (11th ed.) 457.

"I take it that twenty years' exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament." — *Per* LORD ELLENBOROUGH, C. J., in *Bealey v. Shaw*, 6 East, 208, 215 (1805). He repeated the remark in *Balston v. Bonsted*, 1 Camp. 463, 465 (1808).

"If the plaintiff has enjoyed the support of the land of the defendant for twenty years to keep up his house, and both parties knew of that support, the plaintiff had a right to it as an easement, and the defendant could not withdraw that support without being liable in damages for any injury that might accrue to the plaintiff thereby." — *Per* PARKER, B., *Hide v. Thornborough*, 2 C. & K. 250, 255 (1846).

DANIEL v. NORTH.

KING'S BENCH. 1809.

[*Reported* 11 *East*, 372.]

THE plaintiff declared in case, upon his seisin in fee of a certain messuage or dwelling-house in Stockport, on one side of which there is and was and of right ought to be six windows; and stated that the defendant wrongfully erected a wall 60 feet high and 50 in length near the said house and windows, and obstructed the light and air from entering the same, &c. At the trial before the Chief Justice of Chester it appeared that the plaintiff's premises, which adjoined those of the defendant, were in 1787 altered by the then occupier, and the windows in question (though somewhat altered since) were then put out towards the defendant's premises; and such windows then received the light and air freely over a low bakehouse, which was before that time, and continued till within the last three years to be, tenanted by one Ashgrove, under Sir George Warrender, from whom the present defendant claimed; upon the site of which bakehouse the defendant, who succeeded Ashgrove, built the erection complained of about two years ago, which was considerably higher than the old bakehouse, and darkened some of the plaintiff's windows; but would have been no injury to the plaintiff's premises, if they had continued in their original state, before the alterations which took place while Ashgrove rented under Sir George Warrender the premises now held by the defendant. There was other evidence given at the trial; but ultimately the question made then, and afterwards argued before this court, was whether Sir George Warrender, the then reversioner of the premises occupied by Ashgrove, were bound by his tenant's acquiescence for above twenty years in the

windows put out by the then occupier of the plaintiff's premises against the defendant's premises. It was insisted at the trial that the defendant, standing in the place of the reversioner, was not bound by such acquiescence of the former tenant; but this was overruled by the court below, and the plaintiff recovered a verdict.

Manley, Serjt., obtained a rule *nisi* for a new trial, on the ground of the misdirection of the court.

Topping and *J. Williams*, showed cause against the rule.

LORD ELLENBOROUGH, C. J. The foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant; and that cannot be presumed against him unless there were some probable means of his knowing what was done against him. And it cannot be laid down as a rule of law, that the enjoyment of the plaintiff's windows during the occupation of the opposite premises by the tenant of Sir George Warrender, though for twenty years, without the knowledge of the landlord, will bind the latter. And there is no evidence stated in the report from whence his knowledge should be presumed.

GROSE, J., of the same opinion.

LE BLANC, J. The objection was taken at the trial, that the landlord was not bound by the acquiescence of his tenant, without his knowledge, though for twenty years; but that was overruled, and it was considered as a rule of law that the landlord was so bound. It is true, that presumptions are sometimes made against the owners of land, during the possession and by the acquiescence of their tenants, as in the instances alluded to of rights of way and of common; but that happens, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own, and to make common cause with him; but the same cannot be said of lights put out by the neighbors of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake.

BAYLEY, J. The tenant cannot bind the inheritance in this case, either by his own positive act or by his neglect. If indeed the landlord had known of these windows having been put out, and had acquiesced in it for twenty years, that would have bound him; but here there was no evidence that he knew of it till within the last two years.

*Rule absolute.*¹

¹ In *Barker v. Richardson*, 4 B. & Ald. 579 (1821), the defendants had erected on land adjoining the plaintiff's a building which darkened certain windows of the plaintiff. These windows had existed for more than twenty years, but during all but six of these years the defendant's land had been in possession of the rector of Saint Edmund as tenant for life.

The court *held* that no easement for light and air to the plaintiff's windows had been acquired. ABBOTT, C. J., said, page 582: — "Admitting that twenty years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant, in this case, the grant, if presumed, must have been made by a tenant for

WEBB v. BIRD.

EXCHEQUER CHAMBER. 1863.

[Reported 18 C. B. N. S. 841.]

WIGHTMAN, J.¹ We took time for the consideration of this case on account of its novel character. It appears by the finding of the arbitrator to whom the case was referred by order of Nisi Prius, that the plaintiff

life, who had no power to bind his successor; the grant, therefore, would be invalid, and consequently, the present plaintiff could derive no benefit from it, against those to whom the glebe has been sold."

In *Cross v. Lewis*, 2 B. & C., 686 (1824), the plaintiff claimed an easement over defendant's land for light and air to windows which had existed for at least thirty-eight years. It was shown that defendant's land had been in the possession of a tenant for twenty of these years, but it was not shown that it was so possessed at the time the windows were erected. Held, that, as the windows existed before the tenancy began, the plaintiff was entitled to the easement claimed. *Ring v. Pugsley*, 18 N. Bruns. 803, 819 (1878), *accord*.

In *Davies v. Stephens*, 7 C. & P., 570 (1836), the defendant relied on an alleged public right of way over the plaintiff's land. LORD DENMAN, in summing up to the jury, said, page 571: "All the acts of user seem to have taken place during the occupation of tenants, and their submitting to them cannot bind the owner of the land without proof of his also being aware of it; but still, if you think that such acts of user went on for a great length of time, you may presume that the owner had been made aware of them."

In *Reimer v. Stuber*, 20 Pa. 458 (1853), the court said, p. 468:—

"Where a tenant for years or for life grants an easement, such grant is of no force or validity against the reversioner or remainderman. So, if the tenant of a particular estate suffer an easement to be enjoyed for twenty-one years, it raises no presumption of a grant by him in remainder or reversion. But here the land was occupied by tenants from year to year. The owner of the fee was in possession and had the right to bring suit every year. The case is wholly different from that of one who is out of possession during the whole of the time."

See *Pierre v. Fernald*, 26 Me. 436, 442 (1847); *Cunningham v. Dorsey*, 8 W. Va. 298, 307 (1860); *Pentland v. Keep*, 41 Wis. 490 (1877).

In *Lund v. New Bedford*, 121 Mass. 286 (1876), the plaintiff was the owner of a certain mill and mill privilege. He had agreed to convey the estate to other persons who were in occupation of it. MORRIS, J., said, page 290: "Until the conveyance they occupy it as his tenants, and the reversion is in him. For any temporary trespass, which injures only the present enjoyment of the estate, he cannot recover. But for any injury to his reversion he is entitled to maintain an action."

"It is a settled rule, that where an act is done which violates the rights of any one, and which is of such a nature that, if it be continued for a sufficient period of time, the wrong-doer may acquire a title by adverse possession or presumption of a grant, the person whose rights are violated may maintain an action therefor without proof of any other actual damages. . . . In this case, the defendant has constructed permanent conduits and other works for the purpose of supplying the city with water, and has withdrawn and is constantly withdrawing large quantities of water to the injury of the plaintiff's mill privilege, under a claim of right. If its acts are acquiesced in for a sufficient length of time, it might give the defendant a title by adverse possession. For this invasion of his right, the plaintiff Lund may maintain an action without proof of other actual damage." See 2 Gray, *Cas. on Prop.* (2d ed.) p. 255.

¹ The case was argued before WIGHTMAN, J., BRANWELL, B., CHANNELL, B., BLACKBURN, J., and WILDE, B. The opinion only is given.

was the owner and occupier of a windmill built in 1829 ; that, from the time of its being built, down to 1860, the occupier had enjoyed as of right and without interruption the use and benefit of a free current of air from the west for the working of the mill ; that, in the last-mentioned year, 1860, the defendants erected a school-house within twenty-five yards of the mill, and thereby obstructed the current of air which would have come to it from the west, whereby the working of the mill was hindered, and the mill became injured and deteriorated in value. Two cases were cited and mainly relied on for the plaintiff,—one in the 2 Rolle's Abridgment, p. 704, and the other in 16 Viner's Abridgment, tit. *Nuisance* (G), pl. 19 ; but both are shortly stated, and amount to little more than *dicta* ; and it does not appear that they are anywhere else reported, or in what manner or the terms in which such a right was claimed, whether by prescription or otherwise. There is a third case, called *Trahern's Case*, Godbolt, 238, which was the case of a nuisance caused by building a house so near as to hinder the working of the plaintiff's mill ; and the judgment of the court appears in the first instance to have been like that of the case in Rolle's Abridgment, that so much of the house should be thrown down as hindered the working of the mill. But, the plaintiff contending that the whole house should be thrown down, the case was adjourned, and no ultimate decision appears to have been given. These are all the authorities which we have been able to find upon the subject.

We agree with the opinion of the Court of Common Pleas that the right to the passage of air is not a right to an easement within the meaning of the 2 & 3 W. 4, c. 71, § 2.

The mill was built in 1829, and so the claim cannot be by prescription.

The distinction between easements, properly so called, and the right to light and air, has been pointed out by Littledale, J., in *Moore v. Rawson*, 3 B. & C. 332, 340 ; 5 D. & R. 234.

It remains, therefore, to be considered, whether, independently of the Statute, the right claimed may be supported upon the presumption of a grant arising from the uninterrupted enjoyment as of right for a certain term of years. We think, in accordance with the judgment of the Court of Common Pleas, and the judgment of the House of Lords in *Chasemore v. Richards*, 7 House of Lords Cases, 349, that the presumption of a grant from long-continued enjoyment only arises where the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant. As was observed by Lord Wensleydale, it was going very far to say that a man must go to the expense of putting up a screen to window-lights, to prevent a right being gained by twenty years' enjoyment. But, in that case, the right claimed, which was the percolating of water underground, went far beyond the case of a window. In the present case, it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject, as it must be,

to so much variation and uncertainty, as pointed out in the judgment below, that we think it clear that no presumption of a grant, or easement in the nature of a grant, can be raised from the non-interruption of the exercise of what is called a right by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it.

We are therefore of opinion that the judgment of the court below should be affirmed.

BLACKBURN, J. I perfectly concur in the judgment, but wish, for myself, to guard against its being supposed that anything in the judgment affects the common-law right that may be acquired to the access of light and air through a window, or to the right to support by an ancient building from those adjacent. I agree with my brother Willes, in the court below, that the case of the right to light, before the Statute, stood on a peculiar ground.

*Judgment affirmed.*¹

David Keane (with whom was *Bulwer*), for the plaintiff.

Couch (with whom was *O'Malley*, Q. C.), *contra*, was not called on.

ANGUS v. DALTON.²

QUEEN'S BENCH DIVISION. COURT OF APPEAL. HOUSE OF LORDS.
1877, 1878, 1881.

[Reported 3 Q. B. D. 85; 4 Q. B. D. 162; 6 Ap. Cas. 740.]

CLAIM by Angus & Company, coach-builders, against Dalton and the Commissioners of her Majesty's Works and Public Buildings, for injury to the plaintiffs' factory at Newcastle-upon-Tyne.

¹ Cf. *Chastey v. Ackland*, L. R. [1895], 2 Ch. 389. See *Wheelock v. Jacobs*, 70 Vt. 162 (1897).

² This action was tried in 1876 before *Lush, J.*, who directed a verdict for the plaintiffs. The Queen's Bench Division (*Cockburn, C. J.*, and *Mellor, J.*; *Lush, J.*, dissenting) in 1877 ordered judgment to be entered for the defendants. The Court of Appeal (*Cotton and Thesiger, L. JJ.*; *Brett, L. J.*, dissenting) in 1878 reversed this judgment. The case was argued in the House of Lords in 1879, and again in presence of seven of the judges in 1880. Four of the judges, *Pollock, B.*, *Field, Manisty*, and *Fry, JJ.*, were of opinion that the judgment of the Court of Appeal should be affirmed, and three, *Lindley, Lopes*, and *Bowen, JJ.*, were of opinion that it should be reversed. The law lords, *Lord Selborne, L. C.*, *Lord Penzance*, *Lord Blackburn*, *Lord Watson*, and *Lord Coleridge, C. J.*, were all of opinion that the judgment of the Court of Appeal should be affirmed. Of the eighteen judges who heard the case, twelve, therefore, were one way, and six the other. But the reasons of the majority were very different, and so were those of the minority. All the judges and law lords — except *Lord Coleridge* and *Mellor and Lopes, JJ.*, who contented themselves with expressing their agreement with some one or more of the opinions that were read — gave judgments of their own, most of them very elaborate. The case is too long to print at length, — it fills one hundred and eighty-two pages of the Law Reports, — but it is too important to omit.

A synopsis, therefore, is given of the opinions, and the more important passages are quoted at length.

At the trial, before *Lush*, J., in 1876, the judge directed a verdict for the plaintiffs for the amount claimed, subject to a reference to ascertain the damages, and extended the time to enable the plaintiffs to move for judgment. In April, 1877, the plaintiffs moved accordingly.

¹ The plaintiffs are owners in fee of a coach factory at Newcastle-upon-Tyne. The defendant Dalton is a builder, who had been employed by the Commissioners of Works and Buildings, under a contract to take down a house adjoining to the plaintiffs' factory, and to erect in its stead a building to be used as a Probate office.

The action is brought for excavating the soil of the adjoining property, on which the Probate office was to be built, to such a depth as left the foundation of that part of the coach factory without sufficient lateral support, and thereby causing the factory to fall.

The two houses were apparently built at the same time, and were estimated to be upwards of a hundred years old. They were divided by a wall which belonged to the house pulled down, and which wall had been taken down by the defendants without injury to the factory.

Up to the year 1849, being about twenty-seven years before the accident, both houses had been occupied as dwelling-houses; but in that year the plaintiffs' predecessor converted his house into a coach factory, and to adapt it to this purpose he removed the internal walls, and erected on his own soil close to and in contact with so much of the dividing wall, a large stack of brickwork serving the twofold purpose of a chimney stack, and also of a support to the main girders which had to be put in to sustain the floors. These girders were inserted into the stack on the one side, and into the plaintiffs' wall on the opposite side, and were strongly secured with braces and struts, and they thus formed the main support of the upper stories of the factory. When the defendants removed the dividing wall they left this stack untouched, and erected on the site of the dividing wall a temporary wooden gable so as to protect the factory while the new building was in progress. There had been no cellarage in the adjoining house, and it was not disputed that if none had been made, the stack and the factory would not have been affected by the alterations.

The defendants, however, having removed the dividing wall and erected the temporary gable, proceeded to dig to the depth of several feet below the level of the foundation of the plaintiffs' stack, leaving a thick pillar of the original clay around the stack for the purpose of supporting it during the erection of the new dividing wall. This pillar, however, large as it was, proved to be insufficient. After exposure to the air, and before the foundations of the new wall had been completed, it gave way, and the stack sunk and fell, drawing after it the entire factory.

Under these circumstances, it was contended, on behalf of the defendants, first, that the plaintiffs' factory was not entitled to the support of

¹ In no one of the reports are either the facts or the arguments given. The statement of facts here printed is taken from the opinion of *Lush*, J., 8 Q. B. D. 86, 87.

the adjacent soil ; and, secondly, that at all events the Commissioners of Works and Buildings were not responsible for the negligence of the contractor in not leaving sufficient support or not properly shoring up the chimney stack.

These points were reserved at the trial, which took place before *Lush*, J., at Newcastle at the Summer Assizes, 1876, and a verdict was entered for the plaintiffs, subject to the questions of law and to a reference to an arbitrator to assess the damages, in case the verdict should stand against both or either of the defendants.

Little, Q. C., *G. Bruce*, and *Ridley*, for the plaintiffs.

Sir J. Fitzjames Stephen, Q. C., and *Shield*, for the Commissioners.

Herschell, Q. C., and *Wheeler*, for Dalton.

[*LUSH*, J., was of opinion that the building "had acquired the status of an ancient building" (page 100), and that the plaintiffs were entitled to hold their verdict. In the course of his opinion he said : —]

I conclude, therefore, that the mere absence of assent, or even the express dissent, of the adjoining owner, would not prevent the right to light and support from being acquired by uninterrupted enjoyment, and that nothing short of an agreement, either express, or to be implied from payment or other acknowledgment, that the adjoining owner shall not be prejudiced by abstaining from the exercise of his right, would suffice to rebut the presumption. In other words, that it would be presumed after the lapse of twenty years that the easement had been enjoyed by virtue of some grant or agreement, unless it were proved that it had been enjoyed by sufferance [page 93] . . .

The law of lights having been settled by the Prescription Act, any argument drawn from the Limitation Act applies only to such an easement as the one in question, which was left untouched by the Prescription Act. It seems to me to be the necessary consequence of the Limitation Act, that such an easement should be gained by a length of enjoyment commensurate with that by which a title to the house is gained. It would be a strange anomaly to hold that a title to the house should be acquired, and not a title to that which is essential to its existence, — that the law which bars the owner from recovering the tenement itself after he has acquiesced in a usurped ownership by another for twenty years, yet leaves him at liberty, if he happens to be adjoining owner, to let it down and destroy it altogether, by taking away that which has been its natural support during the whole period. I cannot help thinking that the revolting fiction of a lost grant may now be discarded, in view of the necessary effect of the Limitation Act upon such an easement as this.

It is not, however, necessary in this case to base my judgment on this ground. If the right to support still rests on the doctrine of presumption, no facts are shown which in my opinion are admissible to rebut it, for nothing is shown except that the adjoining owner was not asked for and did not give his assent to the alteration of the house into a factory ; and this, for the reasons already given, cannot, in my opin-

ion, be held to constitute rebutting evidence. If notice to the adjoining owner that an additional burden has been cast upon his land be an ingredient, that is disposed of by the fact that the conversion of the dwelling-house into a factory, and the use of the premises as a factory during twenty-seven years, were things open and notorious.

There are here, then, all the elements which go to make up the ordinary presumption, unmixed with any rebutting element. If such a length of enjoyment under such circumstances does not create a right to support from the adjacent soil, then no building the date of whose origin can be proved can claim it. For the common law does not present any alternative to the time of legal memory, except twenty years' enjoyment. This would be an alarming doctrine, especially at the present day, when a very small proportion of the owners of houses now standing could rest their title to support upon immemorial enjoyment [pages 94, 95].

[COCKBURN, C. J., was of opinion that the defendants had acquired no easement of support; he said:—]

That the right to the lateral support of the adjacent soil for a building which has been superadded to the soil is an easement, as distinguished from the proprietary right to such support for the soil itself in its natural condition, is undoubted. Equally certain is it that, except where the positive law steps in, and, in the absence of any legal origin, gives to a fixed period of possession or enjoyment the status of absolute and indisputable right, every easement as against the owner of the soil must have had its origin in grant. Upon both these points the authorities are uniform and positive. It is no doubt equally true that, in the absence of proof of any grant, the existence of a lost grant may be presumed from length of enjoyment. And in no system of jurisprudence has this doctrine been carried to greater lengths than in our own. In the absence of any sufficient law regulating the period of prescription, judges, to make up for this deficiency, were in the habit of directing juries to presume grants, in the past or possible existence of which no one believed, — a practice to be deprecated, and, in spite of precedent, to be followed with great reserve, and certainly with no disposition to extend it.

Looking to the importance of the question here involved, and to the fact that the law as to lateral support, not having hitherto been brought before a court in banc, has not been made the subject of authoritative decision, it may be useful to trace the growth of this doctrine as to presumption and the extent to which it has been carried, and for this purpose to review the authorities on the law of prescriptive easements.

At the common law there appears to have existed no fixed period of prescription. Rights were acquired by prescription when possession or enjoyment had existed beyond the memory of man, or where, as the legal phrase was, "the memory of man ran not to the contrary." But by several Statutes, fixed periods were limited for the bringing of actions for the recovery of real estate. Prior to the Statute of Merton, Bracton

tells us that the limitation in a writ of right was from the time of Henry I., that is to say, from the year 1100, or 135 years. L. 2, f. 179.

By the Statute of Merton (20 Hen. 3, c. 8) the limitation in a writ of right was from the time of Henry II., — a period of seventy years. Writs of *mort d'ancestor*, and of entry, were not to pass the last return of King John from Ireland, — a period of twenty-five years. Writs of novel disseisin were not to pass the first voyage of the king into Gascony, — a period of fifteen years.

New periods of limitation were fixed by the Statute of Westminster, 3 Edw. 1, c. 39 (1275). By this Statute the time for bringing a writ of right was limited to the time of King Richard I., — a period of eighty-eight years. Writs of *mort d'ancestor*, of cosinage, of aiel, and of entry, were limited to the coronation of Henry III., — about fifty-eight years. The writ of novel disseisin was to remain limited as before, namely, to the passage of Henry III. into Gascony.

It is plain that this Statute had reference to actions for the recovery of real estate. Nevertheless the judges, with that assumption of legislative authority which has at times characterized our judicature, proceeded to apply the rule as to prescription established by the Statute to incorporeal hereditaments, and, among others, to easements.

As might have been foreseen, as time went on, the limitation thus fixed became attended with the inconvenience arising from the impossibility of carrying back the proof of possession or enjoyment to a period which, after a generation or two, ceased to be within the reach of evidence. But, here again, the legislature not intervening, the judges provided a remedy by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from time of legal memory; that is to say, from the time of Richard I. This convenient rule having been established, the judges seem not to have thought it worth while, when the Statute of 31 Hen. 8, c. 2, was passed, by which in a writ of right the time was limited to sixty years, to apply, by an analogous use of that Statute, the time of prescription established by it to actions involving rights to incorporeal hereditaments.

In a case of *Bury v. Pope*, Cro. Eliz. 118, in an action for stopping lights, according to the report, "It was agreed by all the justices that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and the house and the lights have continued by the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect an house or other things against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land; and it was adjudged accordingly."

And as late as 1 Car. 2, it was held in a case of *Sury v. Piggott*, Poph. 166, that to maintain an action for obstructing lights, the light must be prescribed for as having been enjoyed time out of mind.

But the Statute of Jac. 1, c. 21, which limited the time for bringing a possessory action to twenty years, led soon afterwards to a very important change in the law by the arbitrary adoption of that period by the courts as sufficient to found the presumption of the existence of a right from the time of legal memory. Here, again, the boldness of judicial decision stepped in to make up for defects in the law which the supineness of the legislature left uncared for. But it is to be observed, and the observation is specially important to the present purpose, that with all their desire to reduce the period of prescription within reasonable limits, the courts never gave greater effect to length of enjoyment than that of affording a presumption of prescriptive right, capable of being rebutted by proof of an origin at a time later than that of legal memory. Hence, if in the course of a cause it appeared that the disputed right had had a later origin, the presumption failed, and the claim of right was defeated.

The frequency of this result gave rise to a new device. As, independently of prescription, every incorporeal hereditament must have had its origin in grant, the fiction was resorted to of presuming after long user a grant by a deed which in the lapse of time had been lost. At first, to raise this presumption it was required that the user should be carried back as far as living memory would go; but after the Statute of James, user for twenty years was — here again, without any warrant of legislative authority, and by the arbitrary ruling of the judges — held to be sufficient to raise this presumption of a lost grant, and juries were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction. Well might Sir W. D. Evans, while admitting the utility of this doctrine, say that its introduction was “a perversion of legal principles and an unwarrantable assumption of authority.” 2 Ev. Poth. 139.

Thus the law remained till the Act of 2 & 3 Wm. 4, c. 71, was passed, with the view of putting an end to the scandal on the administration of justice which arose from thus forcing the consciences of juries. How far it has effected this purpose will be seen further on.

But this doctrine of presumption from user or enjoyment under the former law could not, according to the highest authorities, be carried, as regarded the presumption of a lost grant, any more than that which had reference to the existence of an easement beyond time of legal memory, further than that of a presumption capable of being rebutted, and so destroyed [pages 102–106] . . .

I am very far from saying that when houses or buildings have stood for many years, especially when they appear to be of equal age, the presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under any of the circumstances from which, at the present time, a grant would properly be implied. Thus they may have been built by one owner, or under a common building lease, or if built by different owners, where

some arrangement for mutual support was come to. Thus, had the plaintiffs' premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or where, from other circumstances, a grant can reasonably be implied, I agree that every presumption should be made and every inference should be drawn in favor of such an easement, short of presuming a grant when it is undoubted that none has ever existed. But in the absence of any such circumstances there is no form of easement in which, as it seems to me, the doctrine of presumption should be more cautiously and sparingly applied than the easement of lateral support. For this easement is obviously one of a very anomalous character. In every other form of easement the party whose right as owner is prejudicially affected by the user has the means of resisting it if illegally exercised. In the case of the so-called "affirmative" easements he can bring his action, or oppose physical obstruction to the exercise of the asserted right. Even in the case of another negative easement, and which is said to approach the more nearly to this, — that of light, — the supposed analogy entirely fails. For although no action can be brought against a neighboring owner for opening windows overlooking the land of another, there is still the remedy, however rude, of physical obstruction by building opposite to them. But against the acquisition of such an easement as the one here in question the adjoining owner has no remedy or means of resistance, — unless, indeed, he should excavate in his own immediately adjacent soil while the neighboring house is being built or before the easement has been fully acquired, for the purpose of causing the house to fall. But what would be thought of a man who thus asserted his right? Or, possibly, as in the present instance, he may have built to the extremity of his own land, and may require the support of his soil to uphold his own house. Is he to endanger and perhaps destroy his own house by excavating under it for the purpose of preventing his neighbor from acquiring the right of support? The question, as it seems to me, answers itself. To say that by reason of an adjoining house being built on the extremity of the owner's soil a right of support is to be acquired in the absence of any grant or assent, express or implied, against the adjacent owner, who may be altogether ignorant whether the house or other building is supported by his soil or not, and who, whether he knows it or not, has no means of resisting the acquisition of an easement against himself, either by dissent or resistance of any kind, appears to me to be repugnant to reason and common sense, as well as to the first principles of justice and right.

For these reasons I cannot entertain a doubt that — at all events as the law stood before the passing of the Prescription Act, 2 & 3 Wm. 4, c. 71 — the presumption of a grant, if any, arising in this case from the support to the plaintiffs' premises having been had for the twenty-seven years, was open to be rebutted; and that when it was proved — or,

what is the same thing, admitted — that when the plaintiffs' premises were rebuilt — the original easement, if any, being, as I have already pointed out, gone — the assent of the defendants' predecessors was not asked for or obtained by grant, or in any other way, to any support being derived from their soil, the presumption was at an end [pages 116–118].

[MELLOR, J., admitted “that the case is not free from great difficulties” (page 180), but entirely agreed with the Chief Justice.]

The defendants had judgment.

An appeal was taken to the Court of Appeal (4 Q. B. D. 162), and argued in May, 1878, before BRETT, COTTON, and THESIGER, L. JJ., by *Little, Q. C., G. Bruce, and Ridley*, for the plaintiffs.

Sir James Stephen, Q. C., and A. E. Gathorne-Hardy, for the Commissioners.

Herschell, Q. C., and Wheeler, for Dalton.

THESIGER, L. J. [after pointing out that the right to lateral support of buildings from soil occupied an intermediate place between the right to the support of soil from soil and the right to the support of building from building, and that it was not a right of property, continued thus:—]

If, then, the right claimed be not a right of property, is it an easement which can be acquired; and if it can, how and under what circumstances may it be acquired? That it is a right or easement, which may under some circumstances be acquired, is treated as clear law by a long series of authorities, and is admitted by all the judgments in the court below; that it is an easement not coming within the Prescription Act appears also to be generally admitted, and is assumed by me; that it is a right or easement, which must be founded upon “prescription or grant express or implied,” is a proposition stated in terms already quoted in the judgment of the Court of Exchequer Chamber in *Bonomi v. Backhouse*, E. B. & E. 646, at page 655; and borne out by the general current of authority upon the subject of the acquisition of easements. I cannot therefore accede to the view suggested by Lush, J., in the court below, that an absolute right to an easement uninterruptedly enjoyed for twenty years may be obtained by analogy to the period of limitation fixed as regards entry on lands by 21 Jac. 1, c. 16. It may be that the commencement of the reign of Richard I. was originally fixed as the period of prescription for incorporeal rights by analogy to the Statute 3 Edw. 1, c. 39, which fixed the same period for alleging seisin in a real action, and there are *dicta* to be found in the books supporting the view that as a matter of theoretical law the same analogy carried with it an alteration as regards incorporeal rights, when the period of sixty years was fixed for a writ of right, and fifty years for a possessory action by 32 Hen. 8. But as a matter of practical law, this analogy does not appear to have been extended by the courts to these last-mentioned Statutes. The reign of Richard I.

still remained the time to which legal memory in regard to easements was supposed to relate, and although the later Statute of 21 Jac. 1, c. 16, did undoubtedly suggest to the minds of the judges the propriety of giving to twenty years' uninterrupted enjoyment of incorporeal rights an effect to some extent at least commensurate with that produced by a similar enjoyment of land, they seem to have been unwilling, probably for good reasons, to go the whole length of applying the Statute by analogy, notwithstanding that if they had done so they would have followed the example set them by their predecessors in respect of the Statute of Edward I. They effected the object which they had in view by the creation of the fiction of a grant made and lost in modern times. Such a fiction, like other fictions, may be open to the strictures passed upon it, although I must add that it has had in my opinion in many respects a beneficial operation, and is after all but an extension of the fiction which had previously formed the basis of prescriptive titles; for every prescription imports a grant which in most cases no one believes in. But whatever may be the merits or demerits of the fiction, it is too late to question the validity of its introduction. The doctrine of lost grant forms part of the law of the land, and any dislike which may be felt for this and like fictions cannot be allowed to interfere with the carrying out of the doctrines involved in them to the full extent which has been sanctioned by established authority. It becomes necessary, therefore, in the first place, to consider the character and extent of the presumption of a lost grant as applicable to easements generally, and then, in the second place, to see in what respects, if any, a difference exists in regard to the particular easement claimed in this action.

And first, as regards easements generally, the authorities cited in the court below establish that this presumption is not a *presumptio juris et de jure*, or, to use other language, is not an absolute and conclusive bar. On the other hand, these same authorities lay down that the uninterrupted enjoyment of an easement for twenty years raises, to use the words of Lord Mansfield, in *Darwin v. Upton*, 2 Wms.'s Notes to Saund. 506, "such decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the jury ought to believe it;" and the corollary upon this proposition is stated by Bayley, J., in *Cross v. Lewis*, 2 B. & C. 686, where he says: "I do not say that twenty years' possession confers a legal right; but uninterrupted possession for twenty years raises a presumption of right; and ever since the decision in *Darwin v. Upton* it has been held that in the absence of any evidence to rebut the presumption, a jury should be told to act upon it." What, then, is the nature of the evidence which would be held to "contradict," "explain," or "rebut" this decisive presumption? Proof of the mere origin of the easement within the period of legal memory is not sufficient for this purpose; it was to meet the hardship which arose from such proof preventing the acquisition of a prescriptive title that the legal fiction of a grant

made and lost in modern times was invented ; neither is it sufficient to prove such circumstances as negative an actual assent on the part of the servient owner to the enjoyment of the easement claimed, or even evidence of dissent short of actual interruption or obstruction to the enjoyment. See *Cross v. Lewis*, 2 B. & C. 686, at page 689, where Bayley, J., speaking of the case of opening windows, says : " If his neighbor objects to them, he may put up an obstruction ; but that is his only remedy, and if he allows them to remain unobstructed for twenty years, that is a sufficient foundation for the presumption of an agreement not to obstruct them." Again, proof that the dominant and servient tenement were originally in one ownership, and were separated under such circumstances as to negative the presumption of any reservation or grant of the easement claimed having actually been made at the time of the separation, would not be sufficient to prevent the presumption arising in a case where the enjoyment has been uninterrupted for twenty years ; see *Livett v. Wilson*, 8 Bing. 115, where, although it was proved that the two tenements were separated by a deed containing no grant or reservation of the easement claimed, the court did not rely upon this fact as supporting the verdict of the jury negating the presumption of a lost deed, but took as their ground the contested character of the user. In harmony, as it appears to me, with the last proposition, is the further proposition that the presumption cannot be rebutted by mere proof by the owner of the servient tenement that no grant was in fact made either at the commencement or during the continuance of the enjoyment. I am not aware that this proposition has been in terms directly decided, but it is almost impossible to suppose that among the numerous cases in which easements have been held by the courts to have been acquired by uninterrupted user for twenty years only, there must not have been many in which the owner of the servient tenement at the time when the period commenced was alive when the action was tried to contradict, if such evidence had been admissible, the fact of a grant ; and if such evidence were admissible, it is almost inconceivable that in the numerous cases in which questions of easements have been discussed, no trace of an opinion to that effect should be found in the observations of the judges. The correct view upon this point I take to be, that the presumption of acquiescence and the fiction of an agreement or grant deduced therefrom in a case where enjoyment of an easement has been for a sufficient period uninterrupted, is in the nature of an estoppel by conduct, which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct. If, instead of its being a mere legal inference, the courts had considered that it was an inference of fact to be drawn by juries like other inferences of fact, and in respect of which the servient owner might be called as a witness to negative the fact by denial of a grant ever having been made, it is difficult to understand how judges

could have systematically, as the Lord Chief Justice admits they did, directed juries to find grants "in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction." 8 Q. B. D. 105. The case of *Campbell v. Wilson*, 3 East, 294, lends support to my view upon this point, and illustrates to some extent my meaning when I speak of explanation of the conduct, which is relied upon as leading to the presumption of a grant. There, under an award made twenty-seven years before action, all rights of way in a particular locality, except those set out in the award, of which the way in dispute in the action was not one, had been extinguished. The facts of the case pointed so strongly to the use of the way in question having originated in a mistaken acting under the award, that the judge in his summing up almost assumed the fact; but, having ruled also that notwithstanding it, the proof of subsequent user as of right was sufficient to raise the presumption of a grant, and the jury having found in favor of the defendant, who claimed the way, the court supported both the ruling and the finding; and Le Blanc, J., said: "Unless the jury could, in the words of the report, refer the enjoyment for so long a time to leave, favor, or otherwise than under a claim or assertion of right, and indeed, unless it could be referred to something else than adverse possession, I think such length of enjoyment is so strong evidence of a right that the jury should not be directed to consider small circumstances as founding a presumption that it arose otherwise than by grant." The direction of the Lord Chief Justice himself to the jury in the case of *Rogers v. Taylor*, 2 H. & N. 828, to which I shall have to refer again, still further supports my view. But while the cases which I have cited throw light upon the point as to what circumstances will not negative the presumption of a grant arising from uninterrupted enjoyment for twenty years, still further light is thrown upon the subject by a consideration of cases cited in the court below, in which the presumption was held to have been properly rebutted. The case of *Barker v. Richardson*, 4 B. & A. 579, was one in which the owner of the servient tenement, a rector, tenant for life, was incompetent to make a grant, and it was held, therefore, that a grant by him could not be presumed. In *Webb v. Bird*, 13 C. B. N. S. 841, which was the case of a claim, as stated in the declaration, to the enjoyment as of right of the "benefit and advantage of the streams and currents of air and wind which had used to pass, run, and flow from the west unto a windmill," and which enjoyment was alleged to have been interrupted by the building of a school-house twenty-five yards to the west of the windmill, Wightman, J., in delivering the judgment of the Court of Exchequer Chamber, said as follows: "In the present case it would be practically so difficult, even if not absolutely impossible, to interfere with or prevent the exercise of the right claimed, subject, as it must be, to so much variation and uncertainty, as pointed out in the judgment below, that we think it clear that no presumption of a grant, or easement in the nature of a grant, can be raised from the non-interrup-

tion of the exercise of what is called a right by the person against whom it is claimed, as a non-interruption by one who might prevent or interrupt it" (page 843). Again, in *Chasemore v. Richards*, 7 H. L. C. 349, a claim was made to underground water, which merely percolated through the strata in no known channels, and it was held by the House of Lords that the claim could not be supported as a right of property, and that looking to the casual and uncertain, as well as secret character of the enjoyment of such water, no grant of an easement could be presumed.

These cases, therefore, as direct authorities, go no further than to show that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of being obstructed as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all ordinary known easements, will prevent the presumption of an easement by lost grant; and on the other hand, indirectly they tend to support the view that as a general rule where no such legal incompetence, physical incapacity, or peculiarity of enjoyment, as was shown in those cases, exists, uninterrupted and unexplained user will raise the presumption of a grant, upon the principle expressed by the maxim, *Qui non prohibet quod prohibere potest assentire videtur*.

This maxim brings me, secondly, to the consideration whether the easement of lateral support for buildings from adjoining soil differs, and if so in what respects, from easements generally, and whether different principles or presumptions of law are to be applied to it. It is said by the Lord Chief Justice that this particular easement is one, the enjoyment of which it is practically impossible to resist. If that be so, then the maxim I have just quoted does not apply, and the proper inference would be that the easement comes within the authority of the cases of *Webb v. Bird* and *Chasemore v. Richards*, and cannot by any period of user, however long, be acquired; but the Lord Chief Justice does not go so far as this; his language upon the point is as follows: "I am very far from saying that when houses or buildings have stood for many years, especially when they appear to be of equal age, the presumption of a reciprocal easement of lateral support ought not to be made. It may reasonably be inferred that they were built under any of the circumstances from which at the present time a grant would properly be implied. Thus, they may have been built by one owner, or under a common building lease, or if built by different owners, where some arrangement for mutual support was come to. Thus, had the plaintiffs' premises remained in their original condition, I should have been prepared to make the necessary presumption to uphold the right. Where land has been sold by the owner for the express purpose of being built upon, or when from other circumstances a grant can reasonably be implied, I agree that every presumption should be made and every inference should be drawn in favor of such an easement, short of presuming a grant when it is undoubted that none has

ever existed." 3 Q. B. D. 116. The Lord Chief Justice appears, therefore, to place the easement of lateral support for buildings in some special class of its own, and while admitting that the doctrine of a lost grant may be under certain circumstances applicable to it, to make its application subject to conditions and limitations other than those which apply to easements generally. Is, then, the nature of the easement so anomalous as to justify this treatment of it? and even if in its nature it does present anomalous features, are they such as have at any time been considered by the courts to warrant distinctive treatment?

Upon the first of these two questions it may not unreasonably be urged that the physical impossibility of resistance to the enjoyment of the easement, if it exists at all, exists only in cases where, while the servient tenement has to bear the burden of the easement, it at the same time as a dominant tenement enjoys a corresponding benefit; that the tenement from which support is claimed, must at the commencement of the period of enjoyment be land either in its natural state or built upon; if the former, that there is little if any more difficulty in physically resisting the enjoyment of the easement than there would be in obstructing the access of light to windows; if on the other hand the servient tenement be land built upon, that then the easement which the dominant tenement will obtain will be no other in kind than that which the servient tenement must either have already acquired or be in the course of acquiring. Notwithstanding this reasoning, I am not inclined to dispute that the easement of support for buildings from adjoining soil does possess physical features, which distinguish it materially from most other easements, except perhaps that of the access of light to ancient windows, to which it has a strong analogy; and, if the principles of law relating to easements were now to be settled for the first time, I might be disposed to limit this particular easement of support, and I may add that of light also, by conditions other than those which are applicable to affirmative easements. But the principles of law relating to easements are in the main settled, and the easement most analogous to the one in question here, namely, that of light, is found to be at common law placed as high as, and by the Prescription Act placed even higher than, affirmative easements, although one, the obstruction of which in many cases must be of the greatest practical difficulty. Can it properly be said, then, that the difficulty or practical impossibility of obstruction in the case of the easement of support for a building by soil is such as to place it at common law in an entirely different category from other easements, and to render it subject to any real legal distinctions? I think not. This very ground of difficulty and practical impossibility of obstruction was present to the minds of the judges, who took part in the judgment in the Court of Exchequer Chamber in *Webb v. Bird*, 13 C. B. N. S. 841, and whilst they decided against the easement claimed in that case on that ground, Blackburn, J., was careful to guard against the

supposition that the reasoning of the judgment extended to the easement of lateral support for buildings. His words were as follows: "I perfectly concur in the judgment, but wish for myself to guard against its being supposed that anything in the judgment affects the common-law right that may be acquired to the access of light and air through a window, or to the right to support by an ancient building from those adjacent. I agree with my Brother Willes, in the court below, that the case of the right to light, before the Statute, stood on a peculiar ground" (page 844). But the question can only be fully answered by tracing down in a little more detail the authorities upon the subject. In *Palmer v. Fleshees*, Sid. 167, which was a case of lights, the resolution of the judges put the right of support for an ancient house upon the same footing as the right to ancient lights. The fact alleged by the Lord Chief Justice (8 Q. B. D. 114), that the case does not say what length of time will constitute a house or lights "ancient," and does not touch the subject of presumption, does not affect the value of the case upon the point for which I cite it. Again, in *Stansell v. Jollard*, 1 Selw. N. P. 457 (11th ed.), Lord Ellenborough in terms affirmed in respect of a building which had stood for twenty years, the right to support, "or as it were of leaning to the adjacent soil," by analogy to the case of lights. It is true that this ruling of Lord Ellenborough was questioned by the Lord Chief Baron Pollock in the case of *Solomon v. Vintners' Company*, 4 H. & N. 585. But the two cases were very dissimilar in their circumstances, and they may well stand together. In *Hide v. Thornborough*, 2 C. & K. 250, Parke, B. (afterwards Lord Wensleydale), held at Nisi Prius that where the house of the plaintiff had been supported for twenty years to the knowledge of the defendant, it had acquired a right to the support; and the observations of the same judge in *Gayford v. Nicholls*, 9 Ex. 702, are to the same effect. In *Brown v. Windsor*, 1 C. & J. 20, there was evidence of express assent on the part of the owner of the servient tenement to the plaintiff's house being rested upon his wall; but at the same time the judges, who decided the case, appear to have been clearly of opinion that apart from the express assent, the acquiescence for twenty-seven years in the enjoyment of the support afforded presumptive proof of the right to the easement claimed. This case, however, was so special in its circumstances as not to afford much assistance upon the point under consideration. The case of *Partridge v. Scott*, 3 M. & W. 220, is a more important authority. There a house built more than twenty years before action stood upon land which had been excavated, according to the assumption of the court, within twenty years; and, if it had not been for the excavation of the land, the mining operation of the defendant on the adjacent soil would not have affected the house. The court in a considered judgment delivered by Alderson, B., decided that the right to lateral support for the house standing as it did upon excavated soil had not been acquired. But the judgment at the same

time in substance affirmed these propositions, namely, first, that the house as an ancient house would, but for the excavation of the soil upon which it stood, have acquired an easement of support by virtue of an implied grant; secondly, that, apart from the Prescription Act, such a grant might have been inferred from an enjoyment of the house, although standing upon the excavated soil, for twenty years after the defendants might have been or were fully aware of the facts. The judgment, therefore, seems to assume that, in the case of a house standing upon soil in its ordinary condition, the servient owner has sufficient notice of the fact of support being enjoyed to raise the presumption of acquiescence, and the consequent implication of a grant by him, when the enjoyment has continued for twenty years. *Rogers v. Taylor*, 2 H. & N. 828, was a case of subjacent support, in which there had been twenty years' enjoyment of the support, which, however, upon the trial was alleged on the part of the defendants to have been only a contentious enjoyment subject to acts negating any right of support; the Lord Chief Justice himself, as I have already mentioned, tried the case, and he told the jury that he thought at the end of twenty years after the house had been built the plaintiff would have acquired a right to support, unless in the mean time something had been done to deprive him of it; that the jury must presume that the additional burden was put upon the land by the assent of the owner of the minerals, and must presume a grant by such owner of a right to support. He thereupon left it to the jury to say whether the plaintiff had enjoyed the support for the foundations of his house for twenty years, and the verdict found for the plaintiff upon the direction was upheld by the court. *Humphries v. Brogden*, 12 Q. B. 739, was a case of subjacent support of soil by soil, but the considered judgment of the Court of Queen's Bench, delivered by Lord Campbell, C. J., while affirming the existence of the right as a natural right of property unaffected by a reservation of minerals, went at great length into the analogies to be derived from the principles of law relating to rights of lateral support, and treated as unquestionable law the proposition, that a right to lateral support of a house by the adjacent soil may be acquired like other easements by twenty years' uninterrupted enjoyment of such support. The language of the judgment upon this point is as follows: "Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house: *Stansell v. Jollard*, 1 Selw. N. P. 457 (11th ed.), and *Hide v. Thornborough*, 2 C. & K. 250. Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favors the preservation of enjoyments acquired by the labor of one man and acquiesced in by

another who has the power to interrupt them; and as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle" (page 749). The words "with his knowledge," used in the passage I have quoted, as well as in the ruling of Parke, B., in *Hide v. Thornborough*, must, I think, be referable to cases like *Partridge v. Scott*, 3 M. & W. 220, which is cited in the judgment, and to any other cases in which the circumstances of a house are of such a special character as to throw without the knowledge of the servient owner a greater than ordinary burden upon his tenement, and cannot be construed to mean that any special knowledge is required in the case of an ordinary house, which must as a matter of course, and to the knowledge of every person, increase by its downward pressure the lateral thrust of the soil upon which it stands. The question of knowledge, however, as affecting the present case is a material one, and will be considered by me more particularly before the close of this judgment. Lastly, comes the case of *Bonomi v. Backhouse*, E. B. & E. 646; 9 H. L. C. 503, the judgments and opinions in which certainly assume the right of lateral support to a building from adjacent land to stand as high as other easements, if indeed they do not treat it as one more nearly approaching a right of property, and as such, more easily to be acquired than an ordinary easement.

The result of the authorities which I have cited is to show that in the opinion of a large number of judges, ranging over a period of one hundred years, from 1761 to 1861, the grant of a right of support for buildings by adjacent soil is one subject to like conditions as, and which may be acquired in like manner with, easements generally by proof of uninterrupted enjoyment for twenty years. Against the consensus of *dicta* in support of this view no direct authority or even distinct *dictum* is produced. And under such circumstances I do not feel myself justified, even if I were so disposed, which I am not, in running counter to judicial views so long and so consistently entertained.

But the question still remains whether the right of support acquired by user is an absolute one attaching itself to any house, which has stood the requisite time, or whether any and what limitation is to be put upon the right in this respect. I have already incidentally touched upon this question, and its answer, as it appears to me, is to be found in a reference again to the rule, that a user which is secret raises no presumption of acquiescence on the part of the servient owner, and, as a consequence, no presumption of right in the dominant. If, therefore, a particular house were by reason of some intrinsic or extrinsic weakness of a serious character, or owing to some unreasonable method of construction, to require an amount of support greater than houses of its kind usually require, I think that the mere enjoyment in fact of that extra support would not raise the presumption of acquiescence on the part of the servient owner, or create after twenty years' user a right to

that extra support. If, on the other hand, a house is of ordinary stability and of reasonable construction, I think it equally clear that the owner of the adjacent soil must be assumed to know the amount of lateral support, which such a house must need, and is bound to afford it as a matter of right after the house has in fact enjoyed it for twenty years. This question was discussed but not decided in *Dodds v. Holme*, 1 Ad. & E. 493. In *Partridge v. Scott*, 3 M. & W. 220, the house was ancient, but the excavation which necessitated the additional support was assumed to be modern, and the judgment therefore in that case is not a direct authority upon the question; but the *dictum* contained in the judgment, that a grant of the additional support ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts, is a distinct intimation of the opinion of the court upon the question. If the knowledge on the part of the servient owner is required to make effective the enjoyment of additional support for a house where it is rendered necessary by the soil under it having been excavated, it must equally be required where, by reason of some internal alteration of the house itself, some special support beyond what the general construction and character of the house would indicate becomes necessary.

This, as I have already said, I infer to have been the meaning of Parke, B., in *Hide v. Thornborough*, and of the Court of Queen's Bench in *Humphries v. Brogden*, when they speak of knowledge as a necessary condition of the easement of support. It may be that in the case of the conveyance of one or both of two houses belonging to one owner, each of which is in fact enjoying, by virtue of some peculiarity of construction, a more than ordinary amount of support from the soil of the other, reciprocal grants of the right of support may be presumed without proof of notice or knowledge; but such a case involves different considerations to those which belong to ordinary cases of easements claimed by user, and it appears to me that to hold that a house, whatever be its construction and whatever the amount of support it may need, acquires, merely by twenty years' enjoyment of such support, an absolute right to it, would be to run counter to well-established laws of easements as well as to offend against the principles of reason and justice, on which those laws are founded. Applying, then, these observations to the present case, I cannot concur in the ruling of Lush, J., at the trial, that where a building of any kind has stood for twenty years it has acquired an absolute right of support, without reference to the question of notice to the adjacent owner; and inasmuch as the effect of that ruling was practically to preclude the counsel for the defendants both from addressing the jury and, if they were so minded, from calling witnesses upon the question of notice, I feel a difficulty in seeing how, under such circumstances, a new trial can be refused to the defendants. But apart from what I hold to be the erroneous ruling of the learned judge, and assuming that his ruling had been founded

upon the doctrine of an implied grant, I should still be forced to the conclusion that the defendants are entitled to a new trial. At the close of the plaintiffs' evidence the position of the case stood thus: the plaintiffs' witnesses had proved that the factory was of a construction reasonably stable, but had admitted at the same time that its construction was somewhat unusual. It was clear also that the result of the insertion into the chimney-stack of the girders supporting the upper floors was to concentrate a greater weight at one part of the building than would have been the case, if the girders had, on the side adjoining the defendants' soil, taken their bearings, as they did upon the opposite side, from a dividing wall; and the cross-examination upon this point had raised the issue of the reasonableness of such a method of construction; and lastly, although it was alleged on the part of the plaintiffs that the stack of brickwork would have fallen in consequence of the excavation upon the adjoining soil, without the extra weight of the upper floors of the factory upon it, the counsel for the commissioners distinctly intimated that he was prepared to negative by witnesses that allegation. This being the position in which the case stood, I cannot hold that the jury could be properly directed as a matter of law to presume a grant of the easement claimed upon the footing of its having been enjoyed with the knowledge of the defendants, and, as a consequence, with their acquiescence; and I think that the defendants' counsel were warranted in asking that the jury should determine whether the weight which had been put upon the adjoining soil was such as the owner of the soil could, under the peculiar circumstances of the case, be reasonably expected to be aware of and to provide for [pages 170-183].

[COTTON, L. J., agreed substantially with THESIGER, L. J.]

BRETT, L. J., gave his opinion, that the right to the lateral support of buildings from soil was not a right of property, but an easement; that it could be given by express grant; that it was not within the Prescription Act; and that it could be "supported by the application of what has been called the doctrine of a lost grant" (page 198). He then continued:] I am thus brought to acquiesce in all the propositions in which the learned judges of the Queen's Bench Division were agreed, and to have only further to give my opinion upon the proposition on which they differed.

Unless we are controlled by authority, we ought not, as it seems to me, to take what I will respectfully venture to call the bold step taken by Lush, J. He deprecates that which, he affirms, was an assumption of legislative power by the judges, who introduced the fiction of a lost grant; but, with deference, I think he exercises the power of legislation, and does not confine himself to the duty of declaration, when he holds that a twenty years' user without physical obstruction shall, of itself, as matter of law, confer a right, not because such facts bring the case within the Prescription Act, or the Limitation Act, but by judicial authority, because the Statute of Limitations has fixed twenty years as

the limit, after which under certain conditions an action cannot be maintained for the recovery of real property. I incline to agree that the judges of former times did encroach upon the legislative function in what they held with regard to the doctrine of a lost grant, and to the effect they gave, in support of that doctrine and of the doctrine of prescription, to a user of twenty years. Yet so far as their ruling has been affirmed by courts, to whose decisions we owe obedience, we are, in my opinion, bound to accept and apply their ruling. But I do not think that any judges now should, in order to overcome a different apparent hardship or difficulty, follow their example. This then being the doctrine which is to be applied, a question has been raised whether, in applying it, it is necessary to find formally that there has been a grant which is lost, or whether it is sufficient without going on to find the inference that there has been a grant and that it is lost, to find the fact of an uninterrupted user for twenty years after knowledge of the burden imposed on the adjacent land. That must depend on whether the inference is to be treated as a necessary legal consequence or as an inference of a fact. If it is an inference merely of law, I can see no distinction, not even the slightest, between the doctrine or application of the doctrine of a lost grant, and the doctrine of prescription under the Prescription Act. If we were to hold that it is a mere inference of law, it seems to me that we should be doing in an analogous form precisely what was done by the judgment of Lush, J., which I think cannot be supported. Such a decision is legislation and not declaration. The forms of expression used by Lord Ellenborough, by Parke, B., and Bramwell, B., in the passages I have cited, are relied upon as showing, it is said, that in their opinion a twenty years' user, uninterrupted in fact, gives an absolute right, and therefore a right which cannot be contradicted, and therefore a right on the part of the plaintiff who has proved such user to a judgment thereupon that he has established his right. But those expressions are consistent with the view that those learned judges were speaking of the effect of evidence of user for twenty years *without any other evidence*, and as laying down that in such case in a trial before a judge and jury, the judge would be bound to direct the jury to find the existence of a lost grant. They seem to me, when read with their context, to be only consistent with that interpretation of them. I do not believe that any one of those learned judges meant to say that in the case of a trial by judge and jury the plaintiff could succeed without a finding by the jury under direction, or upon consideration, of the existence of a lost grant: none of them meant to say that a special verdict would have been good which did not in terms find the existence of a grant. No case, I am sure, can be found in which on a trial with a jury the judge has not either directed the jury to find, or left to them to find, the fact as a fact whether there has been a grant. No judge could have called this doctrine a revolting doctrine, unless he had been of opinion that the jury must be asked to find the fact as an existing fact. If it were only an inference of law, there is

thing which can be called revolting in it. In order therefore to support such a claim, the existence of a lost grant must be found as a fact. If the case is tried before a judge without a jury, he must find the fact, though he may not do so in terms; if it is tried before a judge and jury, inasmuch as the judge cannot in such case determine the fact, it is the jury which must find the fact. This raises another question, namely, whether the judge may under certain circumstances direct the jury as matter of law to find the fact; and if he may, what are the circumstances under which he may or must do so. It is admitted by every one, I think, that he is bound to do so, where there is evidence of twenty years' uninterrupted user after knowledge of the facts and no other evidence. Now arises another question, which is, whether other evidence is admissible or may be acted on? Is it only evidence of acts of interruption? or, although no act of interruption has been done, may evidence be given tending to show that no grant in fact ever made? If the parties are alive, may they be called to prove conclusively that there never was a grant? If the question, whether there ever was a grant, is one of fact to be found by the jury, there is no principle of law which can exclude evidence tending to show that there never in fact was such a grant. The legislature might enact that such evidence should not be given, but there the legislature would interfere with regard to a right to lateral support a Prescription Act similar to that which they have enacted with regard to lights and ways. To introduce into the common law proposition as to the limitation of interruption only by acts, is to introduce an Act in which it required an Act of Parliament to introduce in the lights and ways. The limitation as to them has been held to be a matter of inference from the Statute. The legislature has not done so. The doctrine of inferring a lost grant was brought forward and applied because there is no prescription. The distinction between the facts and the legal mode of applying the latter seem to me to have been laid down by Lord Mansfield in *The Mayor of Hull v. Wainwright*, 102. In that case the question was left to the jury, whether they would not consider the usage from the year 1441 to the present time brought" (i. e., in 1774) "sufficient ground to pre-sume the existence of the duties between the 5th Richard 2 (*anno* 1382) and the year 1441." There had therefore obviously been an uninterrupted user for more than three hundred years, and yet the question was left to the jury. "Now with regard to admitting evidence to show that a charter did exist within time of memory which is supported by record, my opinion is this, that all evidence is admissible on the subject-matter to which it is applied. There is a great distinction between *length of time which operates as a bar* to a claim, and *length of time which is only used by way of evidence*. A jury is concluded by the length of time that operates as a bar; as where the Statute of Limitations is pleaded in bar to a debt, though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of pre-

scription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But *length of time used merely by way of evidence may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other according to circumstances.*" And afterwards: "In questions of this kind possession goes a great way; but there is no positive rule which says that one hundred and fifty years' possession, or any length of time within memory, is a sufficient ground to presume a charter." He must, by the context, mean "to presume as a *presumption of law*." Again: "Under circumstances it may be left to the consideration of a jury or of a court of equity if the case comes properly before them, whether there is not a sufficient ground to presume a charter." The cases of *Campbell v. Wilson*, 8 East, 294; *Darwin v. Upton*, 2 Wms.'s Notes to Saund. 506; and *Cross v. Lewis*, 2 B. & C. 686, are precisely, as I understand them, to the same effect, namely, that although the user is for twenty years without interruption, the inference must be left to the jury.

I am, therefore, of opinion, in conclusion, that the right to lateral support from the adjacent soil of an adjacent owner necessary for buildings in addition to the support necessary for the soil on which they stand, is not a right of property, but that such a right may be established; that where it exists, it consists of a negative easement, by which the land of the adjacent owner is burdened with the servitude that it cannot be so used as to deprive the building of the adjacent owner of the support acquired by virtue of the easement, unless an equivalent support is supplied; that such an easement might be given at once by express grant of the owner of the servient property, and the servitude so imposed would pass with the land; that such a servitude might, as matter of law, be proved as by prescription at common law, but could hardly be so proved, as matter of fact, in accordance with the legal conditions of evidence as to such a prescription; that such an easement is not within the Prescription Act (2 & 3 Wm. 4, c. 71); that such an easement, if it exist in a particular case, must, in contemplation of law, have originated in a grant; that the claim to it may be supported by evidence complying with the legal doctrine of an alleged lost grant; that if in any particular case evidence be given of the existence for twenty years, without interruption, of a building which for that period has required and had support from the soil of the adjacent owner, and the building is of such a nature or in such a position that it must have been apparent to any observant person that it required such support, or if the adjacent owner in fact had notice that it required such support, and if no evidence be given tending to show that there could not have originally been or that there was not and never had been a grant, the plaintiff would be entitled to a direction,

supposition that the reasoning of the judgment extended to the easement of lateral support for buildings. His words were as follows: "I perfectly concur in the judgment, but wish for myself to guard against its being supposed that anything in the judgment affects the common-law right that may be acquired to the access of light and air through a window, or to the right to support by an ancient building from those adjacent. I agree with my Brother Willes, in the court below, that the case of the right to light, before the Statute, stood on a peculiar ground" (page 844). But the question can only be fully answered by tracing down in a little more detail the authorities upon the subject. In *Palmer v. Fleshees*, Sid. 167, which was a case of lights, the resolution of the judges put the right of support for an ancient house upon the same footing as the right to ancient lights. The fact alleged by the Lord Chief Justice (3 Q. B. D. 114), that the case does not say what length of time will constitute a house or lights "ancient," and does not touch the subject of presumption, does not affect the value of the case upon the point for which I cite it. Again, in *Stansell v. Jollard*, 1 Selw. N. P. 457 (11th ed.), Lord Ellenborough in terms affirmed in respect of a building which had stood for twenty years, the right to support, "or as it were of leaning to the adjacent soil," by analogy to the case of lights. It is true that this ruling of Lord Ellenborough was questioned by the Lord Chief Baron Pollock in the case of *Solomon v. Vintners' Company*, 4 H. & N. 585. But the two cases were very dissimilar in their circumstances, and they may well stand together. In *Hide v. Thornborough*, 2 C. & K. 250, Parke, B. (afterwards Lord Wensleydale), held at Nisi Prius that where the house of the plaintiff had been supported for twenty years to the knowledge of the defendant, it had acquired a right to the support; and the observations of the same judge in *Gayford v. Nicholls*, 9 Ex. 702, are to the same effect. In *Brown v. Windsor*, 1 C. & J. 20, there was evidence of express assent on the part of the owner of the servient tenement to the plaintiff's house being rested upon his wall; but at the same time the judges, who decided the case, appear to have been clearly of opinion that apart from the express assent, the acquiescence for twenty-seven years in the enjoyment of the support afforded presumptive proof of the right to the easement claimed. This case, however, was so special in its circumstances as not to afford much assistance upon the point under consideration. The case of *Partridge v. Scott*, 8 M. & W. 220, is a more important authority. There a house built more than twenty years before action stood upon land which had been excavated, according to the assumption of the court, within twenty years; and, if it had not been for the excavation of the land, the mining operation of the defendant on the adjacent soil would not have affected the house. The court in a considered judgment delivered by Alderson, B., decided that the right to lateral support for the house standing as it did upon excavated soil had not been acquired. But the judgment at the same

time in substance affirmed these propositions, namely, first, that the house as an ancient house would, but for the excavation of the soil upon which it stood, have acquired an easement of support by virtue of an implied grant; secondly, that, apart from the Prescription Act, such a grant might have been inferred from an enjoyment of the house, although standing upon the excavated soil, for twenty years after the defendants might have been or were fully aware of the facts. The judgment, therefore, seems to assume that, in the case of a house standing upon soil in its ordinary condition, the servient owner has sufficient notice of the fact of support being enjoyed to raise the presumption of acquiescence, and the consequent implication of a grant by him, when the enjoyment has continued for twenty years. *Rogers v. Taylor*, 2 H. & N. 828, was a case of subjacent support, in which there had been twenty years' enjoyment of the support, which, however, upon the trial was alleged on the part of the defendants to have been only a contentious enjoyment subject to acts negating any right of support; the Lord Chief Justice himself, as I have already mentioned, tried the case, and he told the jury that he thought at the end of twenty years after the house had been built the plaintiff would have acquired a right to support, unless in the mean time something had been done to deprive him of it; that the jury must presume that the additional burden was put upon the land by the assent of the owner of the minerals, and must presume a grant by such owner of a right to support. He thereupon left it to the jury to say whether the plaintiff had enjoyed the support for the foundations of his house for twenty years, and the verdict found for the plaintiff upon the direction was upheld by the court. *Humphries v. Brogden*, 12 Q. B. 789, was a case of subjacent support of soil by soil, but the considered judgment of the Court of Queen's Bench, delivered by Lord Campbell, C. J., while affirming the existence of the right as a natural right of property unaffected by a reservation of minerals, went at great length into the analogies to be derived from the principles of law relating to rights of lateral support, and treated as unquestionable law the proposition, that a right to lateral support of a house by the adjacent soil may be acquired like other easements by twenty years' uninterrupted enjoyment of such support. The language of the judgment upon this point is as follows: "Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house: *Stansell v. Jollard*, 1 Selw. N. P. 457 (11th ed.), and *Hide v. Thornborough*, 2 C. & K. 250. Although there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favors the preservation of enjoyments acquired by the labor of one man and acquiesced in by

ion, be held to constitute rebutting evidence. If notice to the adjoining owner that an additional burden has been cast upon his land be an ingredient, that is disposed of by the fact that the conversion of the dwelling-house into a factory, and the use of the premises as a factory during twenty-seven years, were things open and notorious.

There are here, then, all the elements which go to make up the ordinary presumption, unmixed with any rebutting element. If such a length of enjoyment under such circumstances does not create a right to support from the adjacent soil, then no building the date of whose origin can be proved can claim it. For the common law does not present any alternative to the time of legal memory, except twenty years' enjoyment. This would be an alarming doctrine, especially at the present day, when a very small proportion of the owners of houses now standing could rest their title to support upon immemorial enjoyment [pages 94, 95].

[COCKBURN, C. J., was of opinion that the defendants had acquired no easement of support; he said:—]

That the right to the lateral support of the adjacent soil for a building which has been superadded to the soil is an easement, as distinguished from the proprietary right to such support for the soil itself in its natural condition, is undoubted. Equally certain is it that, except where the positive law steps in, and, in the absence of any legal origin, gives to a fixed period of possession or enjoyment the status of absolute and indisputable right, every easement as against the owner of the soil must have had its origin in grant. Upon both these points the authorities are uniform and positive. It is no doubt equally true that, in the absence of proof of any grant, the existence of a lost grant may be presumed from length of enjoyment. And in no system of jurisprudence has this doctrine been carried to greater lengths than in our own. In the absence of any sufficient law regulating the period of prescription, judges, to make up for this deficiency, were in the habit of directing juries to presume grants, in the past or possible existence of which no one believed, — a practice to be deprecated, and, in spite of precedent, to be followed with great reserve, and certainly with no disposition to extend it.

Looking to the importance of the question here involved, and to the fact that the law as to lateral support, not having hitherto been brought before a court in banc, has not been made the subject of authoritative decision, it may be useful to trace the growth of this doctrine as to presumption and the extent to which it has been carried, and for this purpose to review the authorities on the law of prescriptive easements.

At the common law there appears to have existed no fixed period of prescription. Rights were acquired by prescription when possession or enjoyment had existed beyond the memory of man, or where, as the legal phrase was, "the memory of man ran not to the contrary." But by several Statutes, fixed periods were limited for the bringing of actions for the recovery of real estate. Prior to the Statute of Merton, Bracton

tells us that the limitation in a writ of right was from the time of Henry I., that is to say, from the year 1100, or 135 years. L. 2, f. 179.

By the Statute of Merton (20 Hen. 3, c. 8) the limitation in a writ of right was from the time of Henry II., — a period of seventy years. Writs of *mort d'ancestor*, and of entry, were not to pass the last return of King John from Ireland, — a period of twenty-five years. Writs of novel disseisin were not to pass the first voyage of the king into Gascony, — a period of fifteen years.

New periods of limitation were fixed by the Statute of Westminster, 3 Edw. 1, c. 39 (1275). By this Statute the time for bringing a writ of right was limited to the time of King Richard I., — a period of eighty-eight years. Writs of *mort d'ancestor*, of cosinage, of aiel, and of entry, were limited to the coronation of Henry III., — about fifty-eight years. The writ of novel disseisin was to remain limited as before, namely, to the passage of Henry III. into Gascony.

It is plain that this Statute had reference to actions for the recovery of real estate. Nevertheless the judges, with that assumption of legislative authority which has at times characterized our judicature, proceeded to apply the rule as to prescription established by the Statute to incorporeal hereditaments, and, among others, to easements.

As might have been foreseen, as time went on, the limitation thus fixed became attended with the inconvenience arising from the impossibility of carrying back the proof of possession or enjoyment to a period which, after a generation or two, ceased to be within the reach of evidence. But, here again, the legislature not intervening, the judges provided a remedy by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from time of legal memory; that is to say, from the time of Richard I. This convenient rule having been established, the judges seem not to have thought it worth while, when the Statute of 31 Hen. 8, c. 2, was passed, by which in a writ of right the time was limited to sixty years, to apply, by an analogous use of that Statute, the time of prescription established by it to actions involving rights to incorporeal hereditaments.

In a case of *Bury v. Pope*, Cro. Eliz. 118, in an action for stopping lights, according to the report, "It was agreed by all the justices that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and the house and the lights have continued by the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect an house or other things against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land; and it was adjudged accordingly."

And as late as 1 Car. 2, it was held in a case of *Sury v. Piggott*, Poph. 166, that to maintain an action for obstructing lights, the light must be prescribed for as having been enjoyed time out of mind.

viously afforded by that land, and 2, that the owner of a new building has no such right. The cases on these points are so fully cited and discussed by Lush, J., in the Queen's Bench Division, and by Thesiger, L. J., in the Court of Appeal, that it will be sufficient to refer to these judgments for their details. Suffice it to add that the authorities, commencing in the year 1803, include rulings at Nisi Prius by Lord Ellenborough, Lord Wensleydale, and the late Lord Chief Justice of England; an expression of opinion by Lord Blackburn; and judgments by the Courts of Exchequer and Common Pleas which assert or involve the propositions referred to; and, though no clear authority of an earlier date is found, the distinction between a new and an old house as regards the right to support appears to be hinted at in the cases of *Wilde v. Minsterley*, 15 Car. 1, 2 Roll. Abr. 564, Trespass, I. pl. 1, and of *Palmer v. Fleshees*, 15 Car. 2, 1 Sid. 167.

These cases constitute a body of authority, which, in my opinion, must be regarded as conclusive that, according to the law of England, an ancient house possesses a right to support from the adjoining soil; and, therefore, I answer your Lordships' first question in the affirmative.

From what I have said it follows that a right to support may, according to our law, be acquired independently of express contract; and, in order to answer your Lordships' second question, it becomes essential to inquire on what principle, in what time, and under what circumstances, it may be so acquired. Mere lapse of time can never, it appears to me, on any intelligible principle, confer a right not previously possessed; though lapse of time accompanied by inaction, where action ought to be taken, may well have such a result. "Mere lapse of time," said Chief Justice Dallas in *Gray v. Bond*, 2 B. & B. 671, "will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts." Strictly speaking, the right in question cannot, I think, be prescribed for; for it is common learning that prescription can only be for incorporeal hereditaments "and cannot be for a thing which cannot be raised by grant" (2 Bl. Com., bk. ii. c. 17, 21st ed., p. 264), and, as I have already shown, the right in question does not, in my opinion, lie in grant.

But leaving such technical questions aside, I prefer to observe that, in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest. It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, 1st, the doing of some act by one man upon the land of an-

other; 2dly, the absence of right to do that act in the person doing it; 3dly, the knowledge of the person affected by it that the act is done; 4thly, the power of the person affected by the act to prevent such act either by act on his part or by action in the courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the courts to say that he shall not afterwards interfere to stop the act being done. In some other cases, as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made, appears to me to be plain, both from reason, from maxim, and from the cases.

As regards the reason of the case, it is plain good sense to hold that a man who can stop an asserted right, or a continued user, and does not do so for a long time, may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer. But there is no sense in binding a man by an enjoyment he cannot prevent, or quieting a possession which he could never disturb.

Qui non prohibet quod prohibere potest, assentire videtur (Co. Inst. 2d part, vol. i. p. 305; per Parke, B., in *Morgan v. Thomas*, 8 Ex. 304); *Contra non valentem agere, nulla currit prescriptio* (Pothier, *Traité des Obligations*, part iii. chap. viii. art. 2, § 2; Broom's *Maxims*, 5th ed., 903), are two maxims which show that prescription and assent are only raised where there is a power of prohibition.

And again, the cases of *Chasemore v. Richards*, 7 H. L. C. 349; *Webb v. Bird*, 10 C. B. N. S. 268; 13 C. B. N. S. 841; and *Sturges v. Bridgman*, 11 Ch. D. 852, have established a principle which was stated by Willes, J., in *Webb v. Bird*, 10 C. B. N. S., at p. 382, in these terms. After alluding to the law relative to lights as exceptional, he proceeded, "In general a man cannot establish a right by lapse of time and acquiescence against his neighbor, unless he shows that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim without an unreasonable waste of labor and expense." "Consent or acquiescence," said Thesiger, L. J., in delivering the judgment of the Court of Appeal in *Sturges v. Bridgman*, 11 Ch. D. 862, "of the owner of the servient tenement lies at the root of prescription and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi, nec clam, nec precario*; for a man cannot, as a general rule, be said to consent or to acquiesce in the acquisition by his neighbor of an easement through

an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavors to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence."

Assuming such to be the true grounds and principles of acquiescence, I next inquire how they can be applied to the question of the right of a house to be supported by the adjoining land.

It has been argued at your Lordships' bar that the doctrine applies in its simplest form to the right in question; for it has been contended that the act of building a house on one piece of land which derives lateral support from the adjoining soil of a different owner is both actionable and preventable, and that, therefore, time constitutes a valid bar. Is such a building actionable? I think not. The lateral pressure of a heavy building on soft ground which causes an ascertainable physical disturbance in a neighbor's soil would no doubt be trespass; but no one ever heard of an action for the mere increment caused by reason of a new building to the pre-existing lateral pressure of soil on soil, producing no ascertainable physical disturbance. If that were the law, no one could rightly build on the edge of his land, unless he built upon a rock; and yet the building of walls and other structures on the borders of land is universally recognized as lawful. Nay more, any erection of a house would give a right of action not only to the adjoining neighbors, but to every owner of land within the unascertainable area over which the increase of pressure must, according to the laws of physics, extend. Such an increase of pressure when unattended with unascertainable physical consequences is, in my opinion, one of those minima of which the law takes no heed. The distinction between the principles applicable to water collected into visible streams and that running in invisible ones through the ground, affords a very good analogy to the distinction which I draw between the pressure of an adjoining house which produces a visible displacement of the soil, and that which produces no visible or ascertainable result, but is only a matter of inference from physical science or subsequent experiment.

Is the support of the house by the adjoining soil preventable? I think not. It is of course physically possible for one man so to excavate his own soil as to let down his neighbor's building, and a man may or may not have occasion to excavate his own land for his own purposes; but such an excavation for the sole purpose of letting down a neighbor's house is of so expensive, so difficult, so churlish a character, that it is not reasonably to be required in order to prevent the acquisition of a right. In fact in the case of adjoining houses, it would be to require a man to destroy his own property in order to protect his rights to it.

In the case of air, it is physically possible for the adjoining owners to build a lofty wall round a windmill and shut out the access of air; and in case of underground water it would, at least in some cases, be

physically possible to construct a water-tight barrier through all the water-bearing strata of the soil; but such acts would require such an unreasonable waste of time and money that the not doing of them has been held to import no acquiescence in the flow of air and water respectively: *Chasemore v. Richards*, 7 H. L. C. 849; *Webb v. Bird*, 10 C. B. N. S. 268; 13 C. B. N. S. 841.

If the building of a house by one man which derives support from the adjoining land is neither actionable nor preventable by the owner of the adjoining soil, it seems difficult to see on what principle a covenant as to the user of his own soil can be inferred against the man who can do nothing.

The right to support and the rights to the access of light and air are very similar the one to the other, and are broadly distinguished from most other easements or analogous rights. They are negative as contrasted with affirmative easements. They are analogous with *servitutes ne facias* in the civil law. Such rights when they arise spring, not from acts originally actionable or unlawful on the part of the dominant owner, but from acts done on his own land and within his own rights; they confer on the dominant owner not the right to use the subject, but a right to forbearance on the part of the owner from using the subject, *i. e.*, they create an obligation on the owner of the servient tenement not to do anything on his own land inconsistent with a particular user of the dominant tenement. 2 Austin, Jurisp. 836, 8d ed. They rest on a presumption or inference not of a grant by the neighbor of a right to do something on the grantor's land, but of a covenant by the owner not to do something on his own land.

It is difficult in principle to see how such rights can arise from the doing of lawful acts on the dominant tenement, except in the few cases where the owner of the servient tenement can both lawfully and with reasonable ease interfere to prevent the continued user by his neighbor.

The close likeness between the right to support and to light has been much pressed on your Lordships, as a reason for inferring a right to support by analogy with the cases which before the Prescription Act established the right to light. The peculiarity of these cases is that the courts required the servient owner to submit to the acquisition of the right by his neighbor or to signify his dissent by putting up an actual obstruction. "If his neighbor objects to them" (*i. e.*, to the windows), said Bayley, J., in *Cross v. Lewis*, 2 B. & C. 689, "he may put up an obstruction, but that is his only remedy." This rule as to light appears to have arisen without any full discussion in the courts of the principle on which it rests. But it is plain that the erection of an obstruction was thought so alight a matter that it might reasonably be demanded of the servient owner to negative acquiescence on his part. This rule I consider to be an anomaly, and therefore as not furnishing any principle which ought to be extended. "It is going very far," said Lord Wensleydale in *Chasemore v. Richards* in your Lordships' House, 7 H. L. C. 886, "to say that a man must be at the expense of

putting up a screen to window lights to prevent a title being gained by twenty years' enjoyment of light passing through a window." "These cases," said Willes, J., in *Webb v. Bird*, 10 C. B. N. S. 285, "as compared with the general law are anomalous." "The case of the right to light before the Statute stood on a peculiar ground," said Blackburn, J., in the same case, in the Exchequer Chamber, 13 C. B. N. S. 844. "Any one," said Bramwell, L. J., in *Bryant v. Lefever*, 4 C. P. D. 177, "who reads the cases relating to the acquisition of a right to light, will see that there has been great difficulty in establishing it on principle."

Accordingly, in *Chasemore v. Richards* your Lordships' House declined to apply the analogy drawn from lights to water passing through the earth in unascertained courses, and the Courts of Common Pleas, Exchequer Chamber, and Appeal have declined to apply it to the cases of air (*Webb v. Bird*, 13 C. B. N. S. 841; *Bryant v. Lefever*, 4 C. P. D. 177), and of noise (*Sturges v. Bridgman*, 11 Ch. D. 852).

Lastly, the way in which the Prescription Act deals with the right to light is significant of its anomalous character. It deals, on the one hand, with easements of an affirmative character which are capable of interruption by the servient owner. It deals, on the other hand, not with negative easements generally, but with the right to light alone of all the class to which it belongs. I believe that this argument, derived from the law of lights, has exercised a great influence on the establishment of the right to support; but I consider that in principle it affords no justification for the establishment of such a right. In order that acquiescence may arise, there must, in my opinion, be the power to prevent; and this I conclude, for the reasons I have given, is wanting in the case of the support of buildings by adjoining soil. But there is, in my humble opinion, equally wanting another element, namely, knowledge in the owner of the servient tenement. No doubt the owner of property knows or must be taken to know what occurs openly and visibly on his estate or in its immediate neighborhood, but not that which takes place underground or in a secret manner. Hence he is justly charged with knowledge that his neighbor walks habitually over his land, or has erected a house with windows deriving light over his fields; but he would not be affected with knowledge of the user of a gangway or gallery constructed in the course of secret mining operations. Now the question whether a building does or does not derive any practical support from the neighboring land is one which it appears to me often extremely difficult to answer even for the building owner, and far more difficult to answer for the adjoining owner, who may be ignorant of the nature of the structure erected behind a hoarding; of the incidence of its burden on the soil; of the depth and character of the foundations, whether extending to the rock or resting on the surface soil; and of the nature of the subsoil itself. He may indeed excavate his own land and probably answer the last of these questions; but on the other topics he has no certain means of information, except by

a trespass or an impertinence. It is evident that where the building is on the outcrop of strata, or where the beds have been intersected by dikes or disturbed by faults, it would be difficult or impossible to tell what is the incidence of the burden created by a house except by actual excavation and experiment. The circumstances of the case render it, in my opinion, unjust to impute to a neighbor that plain knowledge of what is going on in his neighborhood which can alone justify the depriving a man of a right to use his own land in a lawful manner.

In the case of *Solomon v. Vintners' Company*, 4 H. & N. 602, the question was as to the right of support of one house by another not immediately adjoining, on the ground of thirty years' enjoyment of such support; and there Bramwell, B., made some observations which seem very relevant to the present inquiry. Supposing such a right to exist, "it must," said the learned judge, "be either as a matter of absolute right, or as a matter of prescription, or under the Prescription Act, or as founded on some supposed lost grant. In any of these cases it can only exist if the benefit was one that was enjoyed as of right, which cannot be unless it was openly and visibly enjoyed. An enjoyment must neither be *vi, precario*, nor *clam*, it must be open. Now when one house visibly leans towards another, a person may make a tolerably shrewd guess that it is partly supported by the other; but it will be only a conjecture. . . . In fact it is impossible to say which house is being supported. It is true that in this case when the defendant's house was removed, the plaintiff's house fell in; but probably nobody who saw the block of buildings would have guessed that such a result would have followed. If any one had done so, it would have been but a matter of conjecture. Therefore, supposing that the plaintiff for more than twenty years had an enjoyment which he says now ought to continue, it was an enjoyment *clam*, not open, and consequently not as of right;" . . . consequently, "no title was gained under any of the different ways in which it has been surmised it might have been gained." On principle I conclude, therefore, that acquiescence does not apply to the right in question.

Another argument in favor of the acquisition of the right in question has been based upon an analogy with the operation of the Statute of Limitations. "It seems to me," said Lush, J., 3 Q. B. D. 94, "to be the necessary consequence of the Limitation Act that such an easement" (*i. e.*, an easement not within the Prescription Act) "should be gained by a length of enjoyment commensurate with that by which a title to the house is gained. It would be a strange anomaly to hold that a title to the house should be acquired, and not a title to that which is essential to its existence; that the law which bars the owner from recovering the tenement itself after he has acquiesced in a usurped ownership by another for twenty years, yet leaves him at liberty, if he happens to be adjoining owner, to let it down and destroy it altogether, by taking away that which has been its natural support during the whole period. I cannot help thinking that the revolting fiction of a

lost grant may now be discarded in view of the necessary effect of the Limitation Act upon such an easement as this."

To the extent of holding that, if the right is to be acquired at all by lapse of time, twenty years is a reasonable period to confer the right, I think that the analogy is sound; but beyond that it appears to me not to go. The Statute of Limitations presupposes a right of action and takes it away if not put in force for twenty years; that furnishes no reason for casting a new burden upon a man where he has no capacity to bring an action or to create a physical obstruction to the exercise of the alleged right. To take away a right of action, if not put in force within a reasonable time, is one thing; to take away a man's right in his property because he does not bring an action which he cannot bring, seems to be quite another thing.

The authorities which establish this existence of the right in question afford no distinct statement of the principle upon which it reposes; but there are to be found in them references to the open character of the user, to the knowledge of the servient owner, and to the lapse of time, which seem to show that some notion of acquiescence was in the minds of the learned judges; but when I ask myself what difference it makes whether the user be open or secret to a man who cannot stop such user, what is the value of knowledge to a man who cannot act on it, and what is the effect of a lapse of time in the course of which nothing can be done, I find myself unable to answer these inquiries; and I think that the circumstances under which the building has been erected and the support enjoyed are immaterial. I regard the right as resting, not on any principle, but solely on a series of authorities which disclose no clear ground for their existence; but as it has been established that the right in question may be acquired by the lapse of time, I think that the period of twenty years may and ought to be held a sufficient one to confer the right.

The period of twenty years was that limited by the Statute 21 James 1, c. 16, for bringing possessory actions and making entries; it was applied by the judges to cases of prescription, so that before the Prescription Act, the uninterrupted enjoyment of an easement for that length of time was constantly held to afford a ground for presuming the necessary grant or covenant; it has been referred to in *Stansell v. Jollard*, before Ellenborough, L., in 1803; 1 Selw. N. P. 10 ed. 485, tit. Consequential Damages; in *Dodd v. Holme*, 1 Ad. & E. 493; and in others of the authorities relative to this very right as sufficient to confer it; and it may well be maintained as reasonable in itself. I therefore answer your Lordships' second question in the affirmative.

I have already shown that I view the right in question as the result of an artificial rule of law, with which knowledge and acquiescence have nothing to do. I therefore answer your Lordships' third question by saying that in my opinion if the acts done by the defendants would have caused no damage to the plaintiff's building as it stood before the alterations made in 1849, it is not necessary to prove that the defend-

ants or their predecessors in title had knowledge or notice of those alterations, in order to make the damage done by their act in removing the lateral support after the lapse of twenty-seven years an actionable wrong.

For the reasons already given, I submit (in answer to your Lordships' fifth question) my opinion that the course taken by the learned judge at the trial of directing a verdict for the plaintiffs was correct, according to the law of England as it now stands. His conclusion involves the proposition that, by the mere act of his neighbor and the lapse of time, a man may be deprived of the lawful use of his own land, — a proposition which shocks my notions of justice, and against which I have struggled, but have struggled in vain; because, as I repeat with regret, I can find no reasonable proposition on which to rest the long line of decisions on the question before your Lordships. It would be presumptuous in me to inquire how far your Lordships will be bound by this long *catena* of authorities, or free to act on reason and principle, and I therefore humbly submit to your wisdom the conflict which appears to me to exist in this important case between the two governing principles of our laws.

[LINDLEY, J., was of opinion "that lapse of time is essential to the acquisition of a right to have a building supported by the land of another person, and that such right is by English law an easement or a right in the nature of an easement" (page 763); that "it is not a purely negative easement like the right to light; for support, even when lateral, involves pressure on and an actual use of the laterally supporting soil" (Ib.); and that he did not see "on principle" why an action might not be sustained without actual damage, but he added: "the authority against it, although purely negative, would, in my judgment, be considered as too strong to be got over" (page 764).

He further was of opinion that the difficulty of preventing the acquisition of a right to lateral support was much greater than that of preventing the acquisition of a right to light; but he thought that the authorities established that a right to lateral support could be acquired in the same way in which a right to light could have been acquired before the Prescription Act, and that in "the face of this current of authority," he was "unable to come to the conclusion that the physical difficulty of obstruction brings the right to lateral support within the cases of *Webb v. Bird*, *Chasemore v. Richards*, and *Sturges v. Bridgman*" (page 765). He continued:—]

The theory of an implied grant was invented as a means to an end. It afforded a technical common law reason for not disturbing a long continued open enjoyment. But it appears to me contrary to the reason for the theory itself to allow such an enjoyment to be disturbed simply because it can be proved that no grant was ever in fact made. If any lawful origin for such an enjoyment can be suggested, the presumption in favor of its legality ought to be made. Nor am I aware of any instance in the equity reports in which it has been held that an ease-

ment openly and uninterruptedly enjoyed for twenty years has been destroyed simply by proof that no grant under seal was ever in fact made. The theory of an implied grant, as distinguished from a legal presumption of some lawful origin, is, in my opinion, untenable and practically misleading, especially now that principles of equity as well as of law have to be applied both to trials with juries and to trials without. I feel a difficulty in saying that acquiescence on the part of the defendant is essential to the acquisition by the plaintiff of a right to support. No one can be properly said to acquiesce in what he cannot prevent; and it rarely happens that the use of land for lateral support can be practically prevented. Express dissent, *i. e.*, an express protest, would no doubt negative assent; and if acquiescence by the owner of the servient tenement is essential to the acquisition of a right to lateral support, a protest by him ought to be sufficient to prevent its acquisition. But I can find no trace of any authority to the effect that a protest would suffice for that purpose in this case any more than in other cases more or less similar, and I understand *Cross v. Lewis*, 2 B. & C. 686, to be an authority against the sufficiency of a protest in a case of light. Further, it is difficult to see why a protest should be required to preserve a right which is not being infringed. A protest is evidence of dissent, but nothing more; and until it is shown that assent is important, dissent cannot be of any avail. The only way in which I can reconcile the authorities on this subject is to hold that a right to lateral support can be acquired in modern times by an open uninterrupted enjoyment for twenty years, and that if such an enjoyment is proved the right will be acquired as against an owner in fee of the servient tenement, unless he can show that the enjoyment has been on terms which exclude the acquisition. Whether he has assented or not, even if he has dissented, appears to me immaterial, unless he has disturbed the continued enjoyment necessary to the acquisition of the right. In the absence of an uninterrupted open enjoyment, the right cannot be acquired, and the answer to your Lordships' second question appears to me to turn on whether the enjoyment in this particular case was open; and this again appears to me to be a question of fact which ought to have been left to the jury. The learned judge who tried the case considered that as the plaintiff's building was openly built and enjoyed, it followed that he had openly enjoyed the support which he in fact had had. I do not think that this is a necessary inference; for the building was very peculiarly constructed, and I agree with Cotton and Thesiger, L. JJ., that the jury should have had their attention called to this point, and have been asked whether the plaintiff had in fact openly enjoyed the support the right to which he claimed [pages 765, 766].

[LOPES, J., contented himself with agreeing with LINDLEY, J. BOWEN, J., gave a longer opinion, but reached the same conclusions.]

The House of Lords took time to consider, and in June, 1881, they gave judgment.

LORD SELBORNE, L. C., thought that the easement was not purely

negative, and that it came within the Prescription Act, but that if it did not, "a grant, or some lawful title equivalent to it, ought to be presumed after twenty years' user" (page 801); "that in this case the kind and degree of knowledge which the adjoining proprietor must necessarily have had was sufficient; that nothing was done *clam*;" and that the evidence did not raise any question on this point which ought to have been submitted to the jury" (page 802).

LORD PENZANCE agreed with the views of Mr. Justice Fry.

LORD BLACKBURN, after expressing his opinion that the right to lateral support of a house could be acquired by prescription, and that a building "which has *de facto* enjoyed (under the circumstances and conditions required by the law of prescription) support for more than twenty years, has the same right as an ancient house would have had" (page 815), continued thus:—]

My Lords, I cannot agree that the only principle on which enjoyment could give the owner of property a prescriptive right over a neighbor's land exceeding what would, of common right, belong to the owner of that property, was acquiescence on the part of the neighbor. Nor even that it is the chief principle. In general such enlarged rights are of such a nature that those over whose property they are enjoyed could in the beginning have stopped them; and a failure to stop them is evidence of acquiescence, and may afford a ground for finding that there was an actual assent; but that is, in many, if not in all cases, a fiction: there is seldom a real assent. But no doubt a failure to interrupt, when there is power to do so, may well be called laches, and it seems far less hard to say that for the public good and for the quieting of titles enjoyment for a prescribed time shall bar the true owner when the true owner has been guilty of laches, than to say that for the public good the true owner shall lose his rights, if he has not exercised them during the prescribed period, whether there has been laches or not; but there is not much hardship. Presumably such rights if not exercised are not of much value, and though sometimes they are, *Ad ea quæ frequentius accidunt jura adaptantur*. This ground of acquiescence or laches is often spoken of as if it were the only ground on which prescription was or could be founded. But I think the weight of authority, both in this country and in other systems of jurisprudence, shows that the principle on which prescription is founded is more extensive.

Prescription is not one of those laws which are derived from natural justice. Lord Stair, in his Institutions, treating of the law of Scotland, in the old customs of which country he tells us prescription had no place (book 2, tit. 12, § 9), says, I think truly, "Prescription, although it be by positive law, founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves, yet hath it been since received by most nations, but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations as to the matter, manner, and time of it."

It was called by the old Roman lawyers *usucapio*, which is defined

(Dig., lib. 41, tit. 3, *De usurpationibus et usucapionibus*, art. 3) to be "adjectio domini per continuationem possessionis temporis lege definiti." And in the same book and title, art. 1, the reason is given: "Bono publico, usucapio introducta est ne scilicet quarundam rerum diu et fere semper incerta dominia essent, quum sufficeret dominis ad inquirendas res suas statuti temporis spatium." This is precisely the object with which modern Statutes of Limitations are established, and it would be baffled if there was to be a further inquiry as to whether there had been acquiescence on the part of the true owner. It is both fair and expedient that there should be provisions to enlarge the time when the true owners are under disabilities or for any other reason are not to be considered guilty of laches in not using their right within the specified period, and such provisions there were in the Roman law, and commonly are in modern Statutes of Limitations; but I take it that these are positive laws, founded on expedience, and varying in different countries and at different times. The minor question whether there should be a new trial, in my mind, depends on the question what positive laws have been adopted by the English courts. To return to the Roman law, *usucapio*, it will be noticed, was confined to the *dominium*, — nearly equivalent to the modern phrase of the legal estate. It was enunciated in the laws of the Twelve Tables, in terms brief, to the extent of being obscure, and simple to the extent of being rude, — "Usus auctoritas fundi biennium, cæterarum omnium annuus est usus." This for centuries, down to the time of Justinian, continued to be the law, as far as regarded the *dominium*, within the old territory of the Republic, but side by side with it, the Prætors introduced, by their edicts, a *jus prætorium*, nearly equivalent to the modern phrase of equity, which practically superseded the old law, and in the provinces was the only law. No one who has ever looked at the Digest will complain of this Prætorian law as brief; nor will any one who has read any portion of it fail to admire the skill with which legal principles are worked out. Some of the edicts of the Prætors are so obviously just and expedient, and are so tersely expressed, that they have been generally adopted, and are quoted as legal maxims by those who often do not know whence they came. Two edicts were restitutory: "Prætor ait, Quod vi aut clam factum est qua de re agitur id cum experiendi potestas est, restituas" (Dig., lib. 43, tit. 24, art. 1). This relieved the true owner from the *usucapio* which transferred the *dominium* in consequence of a possession of two years if the possession was not peaceable or not open.

"Ait Prætor, Quod precario ab illo habes aut dolo malo fecisti ut desineres habere qua de re agitur, id illi restituas" (Dig., lib. 43, tit. 26, art. 2). This relieved him from the effect of a possession of two years if it was not adverse, or if it was fraudulent. By a prohibitory edict, *Uti possidetis* (Dig., lib. 43, tit. 17), the Prætor forbade any one to disturb, by force, any possession which had been obtained *nec vi, nec clam, nec precario*. And on the basis principally, but not exclusively,

of those three edicts, the Prætors established what was called the *præscriptio longi temporis*. I will read what Pothier says in his treatise "De la Prescription, Article Préliminaire, Article 3." I quote from the eighth volume of Pothier's works by M. Dupin, p. 890: "Suivant ce droit du prêteur le possesseur de bonne foi, qui avait eu une possession paisible et non interrompue soit d'un droit incorporel, soit d'un héritage qui n'était pas du nombre de ceux qui étaient *res mancipi* pendant le temps de dix ans *inter presentes*, et de vingt ans *inter absentes*, acquérait après l'accomplissement du temps de sa possession, non le domaine de la chose, mais une prescription ou fin de non recevoir, à l'effet d'exclure la demande en revendication du propriétaire de la chose, qui n'aurait été intentée qu'après l'accomplissement de ce temps. Depuis, on avait aussi accordé une action utile à ce possesseur pour revendiquer la chose, lorsqu'il en avait perdu la possession après l'accomplissement du temps de la prescription." Thus the Prætors, whilst professing to leave the Law of the Tables in force, at least within the old territory of the Republic, practically deprived it of all force. Justinian by two laws (Codex, lib. 7, tit. 25), *De nudo jure Quiritium tollendo*, and tit. 31, *De usucapione transformanda*, changed all this. The two laws are couched in terms that show that those who framed them had very little respect for antiquity, and were intolerant of legal fictions. Justinian, says Pothier, by these enactments has changed the prescription of ten and twenty years into a true *usucapio*, for they have caused the *dominium* to pass to the possessor of the heritage, or the incorporeal right of which he has had during that time a possession or quasi-possession peaceable and not interrupted.

The name of prescription has, however, survived the thing. And in the numerous provinces into which France was before the Revolution divided, many of which were governed by their own customs, the laws of prescription varied. Domat in his treatise on the Civil Law (I quote from the translation by Doctor Strahan), book 3, title 7, § 4, says: "It is not necessary to consider the motives of these different dispositions of the Roman law, nor the reasons why they are not observed in many of the customs. Every usage hath its views, and considers in the opposite usages their inconveniences. And it sufficeth to remark here what is common to all these different dispositions of the Roman law, and of the customs as to what concerns the times of prescriptions. Which consists in two views: one, to leave to the owners of things, and to those who pretend to any rights, a certain time to recover them; and the other to give peace and quiet to those whom others would disturb in their possessions or in their rights after the said time is expired." Those who framed the Code Napoléon had to make one law for all France. To facilitate their task they divided servitudes into classes, those that were continuous and those that were discontinuous, and those that were apparent and non-apparent (Code Civil, Arts. 688, 689). Those divisions, and the definitions, were, as far I can discover, perfectly new; for though the difference between the things must always

have existed, I cannot find any trace of the distinction having been taken in the old French law, and it certainly is not to be found in any English law authority before Gale on Easements in 1839. On this division their legislation was founded. The first Projet of the Code allowed continuous servitudes, whether apparent or not, and discontinuous servitudes, if apparent, to be gained by title or by possession for thirty years. The Code Civil as it was finally adopted by Article 690, allows servitudes, if continuous and apparent, to be acquired by title or by possession for thirty years, and by Article 691 enacts that continuous servitudes not apparent, and servitudes, if discontinuous, whether apparent or not, can only in future be established by titles, but saves vested rights already acquired. The authors of *Les Pandectes Françaises* (Paris, 1804), on whose authority I state this, say (vol. v. p. 488) that this great change from the principle of the Projet was made without any publication of the discussions concerning it, or of the reasons that led to it. And they state more openly than I should have expected in a book published in Paris in 1804, that in their opinion it was not an improvement. It certainly has never been received in English law.

I think that what I have above stated is quite enough to confirm Lord Stair's position that the laws of different countries relating to prescription are positive laws differing in matter, manner, and time in different countries. I think that, though the English law as to prescription was, beyond controversy, greatly derived from the Roman law, the very words of which are often quoted in the earliest English authorities, yet, to borrow the idea expressed by Domat in the passage I have above cited, every system of law is founded on its own ideas of expediency, and that we must look to the English decisions to see what principles have been adopted in it, as upon the balance of inconvenience and convenience expedient, and what have in it been rejected as on the balance inexpedient.

It cannot be disputed that from the earliest times the owner of adjoining land was bound to respect the access of light and air acquired by enjoyment of an ancient window. The immemorial custom of London to build upon an ancient foundation, though thereby an ancient window was obstructed, which was pleaded and held to be a good custom in *Hughes v. Keme*, A. D. 1613 (Yelv. 215), proves the great antiquity of this law. But as far as I find, the first mention of it in a reported case is *Bowry and Pope's Case*, 1 Leon. 168; Michaelmas, 29 & 30 Eliz., A. D. 1587. I will read the whole of it, for though the point actually decided was only that a window first erected in the reign of Queen Mary, that is, after 1553, and not later than 1558, had not acquired in 1587 the status of an ancient window, I think the opinion of the court on points not actually decided is important. "Bowry brought an action upon the case against Pope, and declared that in the time of Edward VI. the Dean and Chapter of Westminster leased two houses in St. Martin's, in London, to Mason for sixty years. The

which Mason leased one of the said houses to one A., and covenanted by the indenture of lease with the said A. that it should be lawful for the said A., his executors and assigns, to make a window in the shop of the house so to him assigned, and afterwards in the time of Queen Mary a window was made accordingly where no window was there before. And afterwards A. assigned the said house to the plaintiff. And now Pope, having a house adjoining, had erected a new building *super solum ipsius Pope ex opposito* the said new window, so as the new window is thereby stopped. The defendant pleaded not guilty, and it was found for the plaintiff. And it was moved for the defendant in arrest of judgment that here upon the declaration appeareth no cause of action, for the window, in the stopping of which the wrong is assigned, appears upon the plaintiff's own showing to be of late erected, *scilicet* in the time of Queen Mary. The stopping of which by any act upon my own land was held lawful and justifiable by the whole court. But if it were an ancient window time out of memory, &c., there the light or benefit of it ought not to be impaired by any act whatsoever, and such was the opinion of the whole court. But if the case had been that the house and soil upon which Pope had erected the said building had been under the estate of Mason, who covenanted as above said, then Pope could not have justified the nuisance, which was granted by the whole court."

It is for this last opinion that I cite the case. The Court of Common Pleas do not seem to have felt the difficulty which pressed so strongly on Littledale, J., in *Moore v. Rawson*, 3 B. & C. 332, and which leads Fry, J., in his very able opinion, to declare that this right does not lie in grant. They seem to have had no doubt that the express covenant operated as a grant of the window, and that neither Mason, nor any who held under his estate, could derogate from that grant by stopping the benefit of the window.

In *Trinity*, 29 Eliz., about nine months later, the Queen's Bench, in *Bland v. Moseley*, decided the second point resolved by the Common Pleas the same way, and they also seem to have agreed with the third resolution. The case is cited in *Aldred's Case*, 9 Co. Rep. 58 b. The reasons, as reported by Lord Coke, are: "It may be that, before time of memory, the owner of the said piece of land has granted to the owner of the said house to have the said windows without any stopping of them, and so the prescription may have a lawful beginning; and Wray, C. J., then said that for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary, for it is said *et vescitur aura ætherea*, and the said words *horrida tenebritate* are significant, and imply the benefit of the light. But he said that for prospect, which is a matter only of delight and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect, *unde dicitur, laudaturque domus longos quas prospicit agros*. But the law does not give an action for such things of delight."

It will be noticed that not a word is said about the possibility of obstructing the light; and, indeed, it seems to me clear that no one could ever have thought of stopping his neighbor's lights by hoardings, until it was established that uninterrupted enjoyment for a period short of time immemorial would give a right. Then some ingenious lawyer thought of that easy mode of preventing the acquisition of a right in a window not yet privileged. The distinction between a right to light and a right of prospect, on the ground that one is matter of necessity and the other of delight, is to my mind more quaint than satisfactory. A much better reason is given by Lord Hardwicke in *Attorney-General v. Doughty*, 2 Ves. Sen. 458, where he observes that if that was the case, there could be no great towns. I think this decision, that a right of prospect is not acquired by prescription, shows that, whilst on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burden upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burden on a very large and indefinite area, should not be allowed to be created, except by actual agreement. And this seems to me the real ground on which *Webb v. Bird*, 10 C. B. N. S. 268; 13 C. B. N. S. 841, and *Chasemore v. Richards*, 7 H. L. C. 349, are to be supported. The rights there claimed were analogous to prospect in this, that they were vague and undefined, and very extensive. Whether that is or is not the reason for the distinction, the law has always, since *Bland v. Moseley*, been that there is a distinction; that the right of a window to have light and air is acquired by prescription, and that a right to have a prospect can only be acquired by actual agreement.

Shury v. Pigott, decided in 1625, is reported in Palmer, 444; Popham, 166; 3 Bulstrode, 339; Noy, 84; Latch, 153; and W. Jones, 145. It seems to have excited a good deal of attention, and many things collaterally to have been discussed which were not necessary for the decision. The actual point decided in *Shury v. Pigott* was, that in a conveyance there was (though nothing was said) an implied grant that neither the conveyor nor any who claimed under him should use their lands so as to deprive the property conveyed of what was necessary for its enjoyment, in that case an artificial supply of water, — a principle which, in the case of a house, would certainly include support.

In *Palmer v. Fleshees*, 1 Sid. 167, the first point ruled by Twysden and Wyndham, JJ., was, "if I, being seised of land, lease forty feet to A., to erect a house upon it, and other forty feet to B., to erect a house on it, and one of them builds a house, and then the other dig a cellar in his land by which the wall of the first house adjoining falls, no action lies for this. And so they said it had been adjudged in *Shury v. Pigott's Case*, for each can make the best advantage of his own, but to them it seemed that the law was otherwise if it had been an ancient wall or house which fell by this digging." The reference to *Shury*

v. *Pigott* shows that in this place "ancient" means "existing before the conveyance of the land." The point actually decided was as to light, and the *ratio decidendi* is thus stated in the report in 1 Levinz, 122. "It was resolved that, although it be a new messuage, yet no person who claims the land by purchase under the builder" (vendor) "can obstruct the lights any more than the builder himself could who cannot derogate from his own grant, by Twysden and Windham, JJ., Hyde being absent and Kelynge doubting. For the lights are a necessary and essential part of the house. And Kelynge said, Suppose the land had been sold first, and the house after, the vendee of the land might stop the lights. Twysden, to the contrary, said, Whether the land be sold first or afterwards, the vendee of the land cannot stop the lights in the hands of the vendor or his assigns. But all agreed that a stranger having lands adjoining to a messuage newly erected, may stop the lights, for the building of any man on his lands cannot hinder his neighbor from doing what he will with his own lands; otherwise if the messuage be ancient, so that he has gained a right in the lights by prescription." I say nothing as to the questions whether there is an implied reservation where the lands are parted with, as well as an implied grant where the house is parted with; or whether, when the land is sold before the house is erected on it, but on the terms that a house is to be built, the purchaser is driven to have recourse to equity to protect his subsequently built house; as neither of these questions is raised by the facts in the present case. But I think it is now established law that one who conveys a house does, by implication and without express words, grant to the vendee all that is necessary and essential for the enjoyment of the house, and that neither he, nor any who claim under him, can derogate from his grant by using his land so as to injure what is necessary and essential to the house. And I think that the right of support from the adjoining soil is necessary and essential for the enjoyment of the house.

Now, if the motive for introducing prescription is that given in the Digest, lib. xli., tit. 3, art. 1, quoted before, I think it irresistibly follows that the owner of a house, who has enjoyed the house with a *de facto* support for the period and under the conditions prescribed by law, ought to be protected in the enjoyment of that support, and should not be deprived of it by showing that it was not originally given to him. And I think that the decisions ending in *Backhouse v. Bonomi*, 9 H. L. C. 503, which is put in a very clear light by Manisty, J., in his opinion, decide that he should not be deprived of it. Fry, J., thinks those decisions are contrary to principle, but too strong to be departed from. I have come to the conclusion, for the reasons I have given, that they are founded on principle.

But it still remains to inquire whether any of the doctrines established by the English law, which on the ground of expediency prevent the acquisition of a right by enjoyment, would apply.

In *Backhouse v. Bonomi*, 9 H. L. C. 503, the workings which did

the mischief were at a considerable distance from the plaintiff's house, and would not have done any harm if the intervening minerals had not been previously removed by the defendant. Very different considerations may arise where the intervening minerals have been removed by the plaintiff himself, or those under whose estate he claims, or even by a third person. I express no opinion as to this, because it is not raised by the facts; but I mention the *Corporation of Birmingham v. Allen*, 6 Ch. D. 284, as Lush, J., did below, to show that it has not been overlooked.

Neither do I think it necessary to express any opinion as to the distinction taken in *Solomon v. Vintners' Company*, 4 H. & N. 585, where it was said that, at all events, the right, if it could be acquired against the next adjoining house, could not be acquired when there were intervening properties, for, in this case, the defendants' land which they excavated was next adjoining to the plaintiffs' house; and I think the right to support from the adjoining land is not open to the objection that it is extensive and indefinite, and so far analogous to a prospect. It seems much nearer in analogy to the right to the access of light to a window; perhaps if it were *res integra* one might doubt if it was expedient to protect an ancient window. But I see no ground for doubting that the right to forbid digging near the foundations of a house without taking proper precautions to avoid injuring it, is, for the reasons given by Lush, J., 3 Q. B. D. 89, one very little onerous to the neighbors, and one which it is expedient to give to the owner of the house.

No question here arises as to the effect of any disability on the part of the owner of the land, nor as to the effect of any restrictions arising from the state of the title.

But a question does arise as to whether there was not, or at least might have been, evidence of something which would prevent the enjoyment here being of that nature which would give rise to prescription on the ground that the possession was not open. The edict of the Prætor that possession must not be *vi vel clam*, as I think, is so far adopted in English law that no prescriptive right can be acquired where there is any concealment, and probably none where the enjoyment has not been open. And in cases where the enjoyment was in the beginning wrongful, and the owner of the adjoining land may be said to have lost the full benefit of his rights through his laches, it may be a fair test of whether the enjoyment was open or not to ask whether it was such that the owner of the adjoining land, but for his laches, must have known what the enjoyment was, and how far it went. But in a case of support where there is no laches, and the rights of the owner of the adjoining land are curtailed for the public benefit, on the assumption that, in general, rights not exercised during a long time are not of much value, and that it is for the public good that such rights (generally trifling) should be curtailed in favor of quieting title; where that is the principle, I do not see that more can be requisite than to let

the enjoyment be so open that it is known that some support is being enjoyed by the building. That is enough to put the owner of the land on exercising his full rights, unless he is content to suffer a curtailment, not in general of any consequence. And in the present case all that is suggested is that the plaintiffs' building was not an ordinary house, but a building used as a factory, which concentrated a great part of its weight on a pillar. It had stood for twenty-seven years, and, as far as appears, would, but for the defendants' operations, have stood for many more years; and there was nothing in the nature of concealment. Any one who entered the factory must have seen that it was supported in a great degree by the pillar. And there is not the slightest suggestion that those who made the excavation were not perfectly aware that the factory did rest on the pillar, or that they took such precautions as would have been sufficient if the building had been supported in a more usual way, but that the mischief happened from its unusual construction. That being so, I am at a loss to see what question the learned judge could, at the trial, on this evidence have left to the jury, beyond the question whether the building had for more than twenty years openly, and without concealment, stood as it was and enjoyed without interruption the support of the neighboring soil. The judge offered to ask the jury if the building fell on account of the weight of the goods stored on the upper story, and I cannot see what else could have been asked [pages 817-828].

[LORD WATSON thought the right of lateral support was a positive easement, and agreed with the result arrived at by the other law lords.]

LORD COLERIDGE simply expressed his agreement with the Lord Chancellor and Lord Blackburn; and the time given by the Court of Appeal to the defendants to exercise their option of a new trial having expired,]

*Judgment was affirmed with costs.*¹

WHEATON v. MAPLE & CO.

COURT OF APPEAL. 1898.

[Reported L. R. [1898] 3. Ch. 48.]

LINDLEY, L. J.² The question raised by this appeal is whether the plaintiff is entitled to an easement of light over the land of the defend-

¹ All the courts and judges were of opinion that the Commissioners were liable for the act of Dalton, in accordance with *Bower v. Peate*, 1 Q. B. D. 321.

² Only the opinion of Lindley, L. J., is given.

The sections of the Prescription Act (2 & 3 Wm. IV. c. 71) mentioned in the opinion are as follows:

"II. No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use

ants. The material facts are as follows: The defendants' land is Crown property. In 1826 a lease of it was granted by the Crown for ninety-nine years from 1815. This lease, therefore, if not previously determined, would expire in 1914. In 1891 this lease became vested in the defendants. On the 5th of September, 1892, they surrendered it to the Crown, and the Crown agreed to grant them a new lease of the same land on certain terms; and the defendants agreed to erect a new building on the land. By this agreement the defendants are to be responsible for, and are to make compensation for, all damage which may be done with respect to (*inter alia*) all rights of air and light which any person may have over the land. Under this agreement the defendants are erecting the building of which the plaintiff complains. The plaintiff is the owner in fee of land adjoining the defendants' land. The plaintiff acquired his title in July, 1852, and he then built the house which he seeks to protect. He and his tenants have enjoyed access of light to that house for more than forty years without interruption. The light so enjoyed will be interfered with by the defendants' new building. The plaintiff issued his writ in this action in March, 1893 — i. e., more than forty years after the commencement of his enjoyment, but within three years after the termination of the Crown lease of 1826 by the surrender above mentioned. The plaintiff's contention is (1) that sect. 3 of the Prescription Act (2 & 3 Will. 4, c. 71) applies to the Crown; (2) that, if not, it applies to the Crown's lessees, who have allowed access of light to be enjoyed over their property for twenty years without interruption; (3) that, if the plaintiff has not acquired a title by sect. 3, he has acquired such title by forty years' enjoyment under sect. 2 of the Act; (4) that at all events a lost grant ought to be presumed in his favor, or immemorial enjoyment ought to be inferred. Mr. Justice Kekewich has held that the plaintiff has not acquired an easement in fee against the Crown, but that he had acquired an easement against the lessees of the Crown for the residue of the term of ninety-nine years granted by the lease of

of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors . . . when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

"III. When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

1826, and that the easement so acquired must be treated as subsisting as against the defendants until the year 1914, when that lease would have expired by effluxion of time if the defendants had not surrendered it. From this judgment the defendants have appealed.

Before considering the effect of the statute 2 & 3 Will. 4, c. 71, it is desirable to dispose of the points relied upon by the plaintiff apart from that Act. A grant from the Crown, as distinguished from its tenant, cannot be presumed, for there has been no enjoyment against the Crown itself; and without it there is no foundation for such a presumption. A title by immemorial prescription is excluded by the known history of the plaintiff's house, which was built in 1852 during the pendency of the Crown lease. The Crown lessee might, no doubt, have granted to the plaintiff, his executors, administrators, and assigns, an easement over the land held under the Crown for the residue of the term created in 1826; such an easement, if so created, would bind the lessee, his executors, administrators, and assigns for the residue of the term thereby created; nor could the lessee, or any one claiming under him, defeat the easement so created by surrendering the term. The lessee could only surrender such interest as he had at the time of the surrender, and the surrenderee could only acquire the same interest: see *Doe v. Pyke*, 5 M. & S. 146; *Piggott v. Stratton*, 1 D. F. & J. 38. Moreover, in this respect the Crown would be in no better position than any other surrenderee. If, therefore, the plaintiff had acquired by a grant from the Crown's lessee an easement for the residue of the term granted by the lease of 1826, the surrender of that lease would not have destroyed such easement; and, notwithstanding the surrender, the easement would have continued, even as against the Crown, until 1914, when the lease would have expired by effluxion of time. But in this case there is no evidence of any grant of any easement by any lessee of the Crown; nor can I infer as a fact such a grant by any of the Crown's lessees. But then it is contended that such a grant ought to be presumed as a matter of law. But this is not so. No such grant is required to account for the state of things which exists, nor is any fiction or presumption necessary to render legal, conduct of the plaintiff which would have been illegal without it. The plaintiff has simply been enjoying his own property, as he was perfectly entitled to do; and no presumption of any grant entitling him to that enjoyment in the past, or to similar enjoyment in future, can properly be made. It is true that it has been said that, after an uninterrupted enjoyment of light for twenty years, a covenant not to interrupt will be presumed: see *Cross v. Lewis*, 2 B. & C. 686; *Moore v. Rawson*, 3 B. & C. 332, 340. But I am not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements, or a lost covenant by such a person not to interrupt in the case of light, and I am certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right. The whole theory of prescription at common law is against

presuming any grant or covenant not to interrupt, by or with any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years. Although, therefore, a grant by a lessee of the Crown, commensurate with his lease, might be inferred as a fact, if there was evidence to justify the inference, there is no legal presumption, as distinguished from an inference in fact, in favor of such a grant. This view of the common law is in entire accordance with *Bright v. Walker*, 1 C. M. & R. 211, where this doctrine of presumption is carefully examined.

The plaintiff's right to the easement claimed is thus reduced to the statute 2 & 3 Will. 4, c. 71. The section specially applicable to light is sect. 3, which excludes all fictions and presumptions of law and is a clear and simple enactment. [His Lordship read the section.] Two questions arise upon this section in the present case, viz.: Does it bind the Crown? Does it confer a temporary right against a lessee of the Crown, although not as against the Crown itself as reversioner? In *Perry v. Eames*, [1891] 1 Ch. 658, it was decided that, although parts of the statute—viz., sects. 1 and 2—bind the Crown, yet sect. 3 does not; the reason being that the Crown is expressly mentioned in sects. 1 and 2, and is not mentioned in sect. 3. Upon reflection, I am of opinion that this decision is correct. Considering the difference between enjoying light in one's own property and enjoying other easements in other people's property, and considering the great alteration made by sect. 3 in the law applicable to light, I cannot regard sect. 3 as a mere addition or proviso to or qualification of sect. 2. It is what it purports to be—viz., a fresh and independent enactment relating to a different kind of easement. The Legislature may well have thought right to bind the Crown when persons had been for many years actively asserting rights over its property, and may yet have purposely omitted to impose upon the Crown the obligation of not interfering with persons who never, in fact, interfered with it. The Crown is never bound by a statutory enactment unless the intention of the Legislature to bind the Crown is clear and unmistakeable, and this is by no means the case in dealing with the question of lights.

I come now to the last question—viz., whether sect. 3 has conferred an easement as against the Crown's lessees. So far as mere language is concerned, and apart from the nature of the subject-matter with which the section is dealing, I should see no difficulty in applying sect. 3 to all English subjects, whether lessees of the Crown or other people; I should see no difficulty in reading "absolute and indefeasible" as meaning absolute and indefeasible as against all persons to whom the section is applicable. But if the section is so read, the consequence will necessarily be to create, by mere occupation and enjoyment, a class of easements which at common law could never have been acquired by prescription, but only by express agreement or grant. An easement for a term of years may, of course, be created by grant;

but such an easement cannot be gained by prescription, and, not being capable of being so acquired, it does not fall within the scope of the statute 2 & 3 Will. 4, c. 71. The expression "absolute and indefeasible," as applied to easements of all kinds, coupled with the declared object of the Act, which is to shorten the time for prescription, shews that the easements dealt with were easements appendant or appurtenant to land, and which, when acquired, imposed a burden forever on the servient tenement. This view of the statute was clearly expressed soon after it passed in *Bright v. Walker*, 1 C. M. & R. 221, and although some passages in Baron Parke's judgment in that case have been criticised, and even dissented from, the broad view which underlies the judgment has never been disapproved. That view, as I understand it, is that the Act has not created a class of easements which could not be gained by prescription at common law, or, in other words, has not created an easement for a limited time only, or available only against particular owners or occupiers of the servient tenement. Such easements can only be created since the Act as before the Act—viz., by grant or by an agreement enforceable in equity, which for most purposes is as efficacious as a deed under seal. Such a grant or agreement must, moreover, be proved as a fact and not be purely fictitious. It was contended that *Bright v. Walker* is inconsistent with *Freuen v. Philipps*, 11 C. B. (N. S.) 449; but this is a mistake attributable to the wording of the head-note in the latter case. In that case the plaintiff had acquired the easement he claimed, not only against the defendant, the adjoining tenant, but also against his lessor, although the plaintiff and the defendant both held under the same landlord. Similar observations apply to *Mitchell v. Cantrill*, 37 Ch. D. 56, and to *Robson v. Edwards*, [1893] 2 Ch. 146.

Although the expression "other easement" occurs in sect. 2, I concur in the view generally hitherto adopted, and judicially held to be correct, in *Perry v. Eames*, [1891] 1 Ch. 658, viz., that light is not included in sect. 2, but is governed entirely by sect. 3 and the subsequent sections which have to be read with it. I may, however, observe that if sect. 2 were applicable to this case, sect. 8 would be also applicable, and that, as the three years there mentioned had not expired before the writ was issued, the plaintiff's right would not have been absolute and indefeasible even under sect. 2. It only remains to add that there are no circumstances in this case giving the plaintiff any equitable, as distinguished from legal, rights against the defendants. For the reasons I have given, I am of opinion that the plaintiff has acquired no right to light under the statute or otherwise, and that the appeal must be allowed and judgment be entered for the defendants, with costs here and below.

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PARKER v. FOOTE.

SUPREME COURT OF NEW YORK. 1838.

[Reported 19 Wend. 309.]

THIS was an action on the case for stopping *lights* in a dwelling-house, tried at the Oneida Circuit in April, 1836, before the Hon. *Hiram Denio*, then one of the circuit judges.

In 1808 the defendant, being the owner of two village lots situate in the village of Clinton, adjoining each other, sold one of them to Joseph Stebbins, who in the same year erected a dwelling-house thereon, *on the line* adjoining the other lot, with windows in it overlooking the other lot. The defendant also in the same year built an addition to a house which stood on the lot which he retained, leaving a space of about *sixteen feet* between the house erected by Stebbins and the addition put up by himself. This space was subsequently occupied by the defendant as an alley leading to buildings situate on the rear of his lot, and was so used by him until the year 1832, when (*twenty-four years* after the erection of the house by Stebbins,) he erected a store on the alley, filling up the whole space between the two houses, and consequently *stopping the lights* in the house erected by Stebbins. At the time of the erection of the store, the plaintiffs were the owners of the lot originally conveyed to Stebbins, by title derived from him, and were in the actual possession thereof, and brought this action for the stopping of the lights. Stebbins (the original purchaser from the defendant,) was a witness for the plaintiffs, and on his cross-examination testified that he never had any written agreement, deed or writing, granting permission to have his windows overlook the defendant's lot, and that nothing was ever said upon the subject. The village of Clinton is built upon a square called Clinton Green, the sides of the square being laid out into village lots, and contained at the time of the trial about one thousand inhabitants. On motion for a nonsuit, the defendant's counsel insisted that there was no evidence of a *user* authorizing the presumption of a grant as to the *windows*; that the *user* in this case was merely permissive, which explained and rebutted all presumption of a grant. That if the *user*, in the absence of other evidence, authorized the presumption of a grant, still that here the presumption was rebutted by the proof, that in fact there never had been a grant. The circuit judge expressed a doubt whether the modern *English* doctrine in regard to stopping lights was applicable to the growing villages of this country, but said he would rule in favor of the plaintiffs, and leave the question to the determination of this court. He also decided that the fact, whether there was or was not a grant in writing as to the windows, was not for the jury to determine; that the law presumed it from the user, and it could not be rebutted by proving that none had in truth been executed. After the evidence was closed, the judge declined leaving

to the jury the question of presumption of right, and instructed them that the plaintiffs were entitled to their verdict. The jury accordingly found a verdict for the plaintiffs, with \$225 damages. The defendant having excepted to the decisions of the judge, now moved for a new trial.

W. C. Noyes, for the defendant.

C. P. Kirkland and J. A. Spencer, for the plaintiffs.

By THE COURT (BRONSON, J.). The modern doctrine of presuming a right, by grant or otherwise, to easements and incorporeal hereditaments after twenty years of uninterrupted adverse enjoyment, exerts a much wider influence in quieting possession, than the old doctrine of title by prescription, which depended on immemorial usage. The period of twenty years has been adopted by the courts in analogy to the Statute limiting an entry into lands; but as the Statute does not apply to incorporeal rights, the adverse user is not regarded as a legal bar, but only as a ground for presuming a right, either by grant or in some other form. The case of *Holcroft v. Heel*, 1 Bos. & Pull. 400, apparently proceeds on the ground of a legal bar; but the report is inaccurate, as will be seen by the explanation of Le Blanc, J., in *Campbell v. Wilson*, 3 East, 298.

To authorize the presumption, the enjoyment of the easement must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right; and it must be with the knowledge and acquiescence of the owner. *Campbell v. Wilson*, 3 East, 294; *Daniel v. North*, 11 East, 372; *Barker v. Richardson*, 4 B. & Ald. 579; *Hill v. Crosby*, 2 Pick. 466; *Sargent v. Ballard*, 9 Pick. 251; *Bolivar Co. v. Neponset Co.*, 16 Pick. 241; *Chalker v. Dickinson*, 1 Conn. R. 382. See also *Doe v. Butler*, 3 Wendell, 149. It is said that there may be cases relating to the use of water, which form exceptions to the rule that the enjoyment must be adverse to authorize the presumption of a grant. See *Bealey v. Shaw*, 6 East, 208; *Ingraham v. Hutchinson*, 2 Conn. R. 584. To this doctrine I cannot subscribe. Without reviewing the cases in relation to the rights of different riparian proprietors on the same stream, I think it sufficient at this time to say, that in whatever manner the water may be appropriated or enjoyed, it must of necessity be either rightful or wrongful. The use of the stream must be such as is authorized by the title of the occupant to the soil over which the water flows, or it must be a usurpation on the rights of another. If the enjoyment is rightful, there can be no occasion for presuming a grant. The title of the occupant is as perfect at the outset, as it can be after the lapse of a century. If the user be wrongful, a usurpation to any extent upon the rights of another, it is then adverse; and if acquiesced in for twenty years, a reasonable foundation is laid for presuming a grant. If the enjoyment is not according to the title of the occupant, the injured party may have redress by action. His remedy does not depend on the question whether he has built on his mill-site, or otherwise appro-

priated the stream to his own use. It is enough that his right has been invaded; and although in a particular case he may be entitled to recover only nominal damages, that will be a sufficient vindication of his title, and will put an end to all ground for presuming a grant. *Hobson v. Todd*, 4 T. R. 71; *Bolivar Co. v. Neponset Co.*, 16 Pick. 241; *Butman v. Hussey*, 3 Fairfield (Me.), 407.

The presumption we are considering is a mixed one of law and fact. The inference that the right is in him who has the enjoyment, so long as nothing appears to the contrary, is a natural one, — it is a presumption of fact. But adverse enjoyment, when left to exert only its natural force as mere presumptive evidence, can never conclude the true owner. No length of possession could work such a consequence. Hence the necessity of fixing on some definite period of enjoyment, and making that operate as a presumptive bar to the rightful owner. This part of the rule is wholly artificial; it is a presumption of mere law. In general, questions depending upon mixed presumptions of this description must be submitted to the jury, under proper instructions from the court. The difference between length of time which operates as a bar to a claim, and that which is only used *by way of evidence*, was very clearly stated by Lord Mansfield, in the *Mayor, &c. v. Horner*, Cowp. 102. "A jury is concluded," he says, "by length of time that operates as a bar, as where the Statute of Limitations is *pleaded in bar* to a debt; though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But length of time *used merely by way of evidence*, may be left to the consideration of a jury to be credited or not, and to draw their inference one way or the other, according to circumstances." In *Darwin v. Upton*, 2 Saund. 175, note (2), the question related to lights, and it was said by the same learned judge that "acquiescence for twenty years is such decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an absolute bar, like a Statute of Limitations; it is certainly a presumptive bar which ought to go to the jury." Willes, J., mentioned a case before him, in which he held uninterrupted possession of a pew for twenty years to be presumptive evidence merely; in which opinion he was afterwards confirmed by the C. B. The other judges concurred; and Gould, J., before whom the action was tried, said he never had an idea but it was a question for a jury; and he compared it to the case of trover, where a demand and refusal are evidence of, but not an actual conversion.

Some of the cases speak of the presumption as conclusive. *Bealey v. Shaw*, 6 East, 208; *Tyler v. Wilkinson*, 4 Mason, 397. This can only mean that the presumption is conclusive, where there is no dispute about the facts upon which it depends. It has never been doubted that the inference arising from twenty years' enjoyment of incorporeal rights,

might be explained and repelled; nor, so far as I have observed, has it ever been denied that questions of this description belong to the jury. The presumption we are considering has often been likened to the inference which is indulged that a bond or mortgage has been paid, when no interest has been demanded within twenty years. Such questions must be submitted to the jury to draw the proper conclusion from all the circumstances of each particular case. *Jackson v. Wood*, 12 Johns. R. 242; *Jackson v. Sackett*, 7 Wendell, 94. In *Sivett v. Wilson*, 8 Bing. 115, the question was on a right of way: the defendant pleaded a grant, and the judge left it to the jury to say, whether they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed; and Best, C. J., said the direction was perfectly right. He added, "I do not dispute that if there had been an uninterrupted usage for twenty years, the jury might be authorized to presume it originated in a deed; but even in such a case a judge would not be justified in saying that they *must*, but that they *may* presume the deed. If, however, there are circumstances inconsistent with the existence of a deed, the jury should be directed to consider them, and to decide accordingly." In *Hill v. Crosby*, 2 Pick. 466, the court set aside the verdict, although they thought it right, because the question had not been referred to the jury.

In a plain case, where there is no evidence to repel the presumption arising from twenty years' uninterrupted adverse user of an incorporeal right, the judge may very properly instruct the jury that it is their duty to find in favor of the party who has had the enjoyment; but still it is a question for the jury. The judge erred in this case in wholly withdrawing that question from the consideration of the jury. On this ground, if no other, the verdict must be set aside.

The bill of exceptions presents another question which may probably arise on a second trial, and it seems proper therefore to give it some examination.

As neither light, air, nor prospect can be the subject of a *grant*, the proper presumption, if any, to be made in this case, is, that there was some *covenant* or *agreement* not to obstruct the lights. *Cross v. Lewis*, 2 Barn. & Cress. 628, *per* Bayley, J.; *Moore v. Rawson*, 3 Barn. & Cress. 332, *per* Littledale, J. But this is a matter of little moment. Where it is proper to indulge any presumption for the purpose of quieting possession, the jury may be instructed to make such a one as the nature of the case requires. *Eldridge v. Knott*, Cowp. 214.

Most of the cases on the subject we have been considering, relate to *ways*, *commons*, *markets*, *watercourses*, and the like, where the user or enjoyment, if not rightful, has been an immediate and continuing injury to the person against whom the presumption is made. His property has either been invaded, or his beneficial interest in it has been rendered less valuable. The injury has been of such a character that he might have immediate redress by action. But in the case of *windows* overlooking the land of another, the injury, if any, is merely ideal

or imaginary. The light and air which they admit are not the subjects of property beyond the moment of actual occupancy; and for overlooking one's privacy no action can be maintained. The party has no remedy but to build on the adjoining land opposite the offensive window. *Chandler v. Thompson*, 3 Campb. 80; *Cross v. Lewis*, 2 Barn. & Cress. 686, *per* Bayley, J. Upon what principle the courts in England have applied the same rule of presumption to two classes of cases so essentially different in character, I have been unable to discover. If one commit a daily trespass on the land of another, under a claim of right to pass over, or feed his cattle upon it; or divert the water from his mill, or throw it back upon his land or machinery; in these and the like cases, long-continued acquiescence affords strong presumptive evidence of right. But in the case of lights, there is no *adverse user*, nor indeed any use whatever of another's property; and no foundation is laid for indulging any presumption against the rightful owner.

Although I am not prepared to adopt the suggestion of Gould, J., in *Ingraham v. Hutchinson*, 2 Conn. R. 597, that the lights which are protected may be such as *project* over the land of the adjoining proprietor; yet it is not impossible that there are some considerations connected with the subject which do not distinctly appear in the reported cases. See *Knight v. Halsey*, 2 Bos. & Pull. 206, *per* Rooke, J., 1 Phil. Ev. 125.

The learned judges who have laid down this doctrine have not told us upon what principle or analogy in the law it can be maintained. They tell us that a man may build at the extremity of his own land, and that he may *lawfully* have windows looking out upon the lands of his neighbor. 2 Barn. & Cress. 686; 3 Id. 332. The reason why he may lawfully have such windows, must be, because he does his neighbor no wrong; and indeed, so it is adjudged as we have already seen; and yet somehow or other, by the exercise of a lawful right in his own land for twenty years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seised of the fee, with the privilege of paying taxes and assessments; but the right to build on the land, without which city and village lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner, remains yet to be settled. 2 Barn. & Cress. 686; 2 Carr. & Payne, 465; 5 Id. 438. Now what is the acquiescence which concludes the owner? No one has trespassed upon his land, or done him a legal injury of any kind. He has submitted to nothing but the exercise of a *lawful* right on the part of his neighbor. How then has he forfeited the beneficial interest in his property? He has neglected to incur the expense of building a wall twenty or fifty feet high, as the case may be,—not for his own benefit, but for the sole purpose of annoying his neighbor. That was his only remedy. A wanton act of this kind, although done in one's own land, is calculated to render a man odious. Indeed, an attempt has been made to sustain an action for erecting such a wall. *Mahan v. Brown*, 13 Wendell, 261.

There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England; and I see that it has recently been sanctioned, with some qualification, by an Act of Parliament. Stat. 2 & 3 Will. 4, c. 71, § 8. But it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences. It has never, I think, been deemed a part of our law. 3 Kent's Comm. 446, note (a). Nor do I find that it has been adopted in any of the States. The case of *Story v. Odin*, 12 Mass. R. 157, proceeds on an entirely different principle. It cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no part of our law. And besides, it would be difficult to prove that the rule in question was known to the common law previous to the 19th of April, 1775. Const. N. Y., art. 7, § 13. There were two *nisi prius* decisions at an earlier day, (*Lewis v. Price*, in 1761, and *Dongal v. Wilson* in 1763,) but the doctrine was not sanctioned in Westminster Hall until 1786, when the case of *Darwin v. Upton* was decided by the K. B. 2 Saund. 175, note (2). This was clearly a departure from the old law. *Bury v. Pope*, Cro. Eliz. 118.

There is one peculiar feature in the case at bar. It appears affirmatively that there never was any grant, writing or agreement about the use of the lights. A grant may under certain circumstances be presumed, although, as Lord Mansfield once said, the court does not really think a grant has been made. *Eldridge v. Knott*, Cowp. 214. But it remains to be decided that a right by grant or otherwise can be presumed when it plainly appears that it never existed. If this had been the case of a way, common, or the like, and there had actually been an uninterrupted adverse user for twenty years under a claim of right, to which the defendant had submitted, I do not intend to say that proof that no grant was in fact made would have overturned the action. It will be time enough to decide that question when it shall be presented. But in this case the evidence of Stebbins, who built the house, in connection with the other facts which appeared on the trial, proved most satisfactorily that the windows were never enjoyed under a claim of right, but only as a matter of favor. If there was anything to leave to the jury, they could not have hesitated a moment about their verdict. But I think the plaintiffs should have been nonsuited.

The CHIEF JUSTICE concurred on both points.

COWEN, J., only concurred in the opinion that the question of presumption of a grant should have been submitted to the jury.

*New trial granted.*¹

¹ The decisions in the United States that no easement for light and air can be acquired by prescription are numerous. See, *contra*, *Clawson v. Primrose*, 4 Del. Ch. 643 (1878); but cf. *Hulley v. The Security Trust Co.*, 5 Del. Ch. 578 (1885).

In *Sullivan v. Zeiner*, 98 Cal. 346 (1893), it was held that no easement for lateral

LAMB v. CROSLAND.

COURT OF APPEALS OF SOUTH CAROLINA. 1850.

[Reported 4 Rich. 536.]

THIS was an action on the case for obstructing a ditch.

The lands of the parties were adjoining. The plaintiff's land, in 1817, belonged to her husband, one Alexander Lamb. The defendant's land, then, belonged to one Bartholomew Cosnahan. Near Lamb's house were some ponds, which, in wet seasons, were filled with water, and produced sickness. Lamb asked and obtained permission from Cosnahan to cut a ditch through his land, for the purpose of draining those ponds. The ditch communicated with an old ditch, called the meadow ditch, by which the water passed off into Crooked Creek. The land through which the ditch was cut by Lamb, was then woodland; it had since been cleared. The ditch had been kept open as a drain for Lamb's land ever since, and worked on occasionally, when it suited the convenience of those who owned the land. The plaintiff was in possession of Lamb's land. Lamb died in 1836. No evidence of how the plaintiff derived title was given; but it was understood, from the course of the testimony, that it had been sold for partition, and she was the purchaser. B. Cosnahan died in 1820, leaving a widow and infant children, one of whom was not of age until 1841. After his death, the land remained in the possession of his widow and the administrator, until 1833, when it was sold for partition, and purchased by one E. Cosnahan, who sold it to one Feagin in 1836. From him it passed to Green. About 1843, he sold to Dudley, and Dudley to the defendant. In 1847, (in January,) in consequence of the lower part of the ditch not being kept sufficiently open, four acres of the defendant's land, on the side of the ditch, were too wet to plough. He sent to the plaintiff, requested her to open it, but she did not do it. In March, the defendant filled up the ditch with dirt and logs. Some negotiation took place, and the plaintiff opened the ditch, but, as it turned out, not sufficiently, for in July there were very heavy rains, and the water ponded on the four acres, and injured the growing crop. The defendant again obstructed the ditch. It remained so four days, when the plaintiff's son removed the obstruction. But in these four days, the corn in the plaintiff's pond was destroyed. For this injury the action was brought, and the sole question presented by the case was, whether the plaintiff had a prescriptive right to drain her land through this ditch. If she had, the defendant had no right to obstruct it. If she had not, then the defendant had a right to fill it up on his own land.

Evidence was given on the question, whether the use had been ad-support to a building can be acquired by prescription. *Mitchell v. Rome*, 49 Ga. 19 (1873); *Tunstall v. Christian*, 80 Va. 1 (1885); *Handlan v. McManus*, 42 Mo. App. 551 (1890), accord.

verse, or only permissive. That question was submitted to the jury, who found for the plaintiff.

In his report of the case, his Honor, the presiding judge [*Evans, J.*], says: —

“It was very clear, that from 1820 to 1833, the land of defendant belonged to infants; and there was not the slightest evidence to change the original character of the use, up to the death of B. Cosnahan. My own opinion, founded on a pretty full argument, made in the case of *Boykin v. Cantey*, which I tried at Kershaw, was, that the presumption of title, arising from adverse use, did not arise when the owners were, at the time of its commencement, infants; and that, even in cases of intervening infancy, the presumption was suspended during infancy, for the presumption depends, not on the use alone, but the acquiescence of the owner. In this case, there is no doubt about the facts. The use began in 1817, and continued to 1847, a period of thirty years. But during the time, the land belonged to infants thirteen years, leaving only seventeen years. Entertaining this opinion, if I had left that point to the jury, they of course would have found for the defendant; but I did not feel at liberty, after having spent more than a day on the trial, to arrest the case by a nonsuit, on an undecided point, and one of difficult solution. The case was sent to the jury on the other points, reserving to the defendant the right to renew his motion in the Appeal Court.”

The defendant appealed, and now moved for a nonsuit, or new trial, on several grounds; the fourth ground for a nonsuit was as follows:

Because, admitting that the plaintiff had adverse possession for twenty-nine years, it was in evidence, that for thirteen years of this time, the proprietors of the servient tenement were infants, against whom an adverse possession could not grow into a right.

Dudley, for the motion.

Thornwell, contra.

CURIA, PER EVANS, J. There are several questions presented by the brief in this case, but as the decision depends on the fourth ground for a nonsuit, none of the other questions will be considered. That ground is in the following words, to wit, “admitting that the plaintiff had adverse possession for twenty-nine years, thirteen years of this time the proprietors of the servient tenement were infants, against whom an adverse possession could not grow into a right.” The facts of the case, necessary to be stated in order to understand this ground, are these. In 1817, the ditch, which was the subject of controversy, was dug by Lamb through Cosnahan’s land, by his permission or consent, for the purpose of draining some ponds on the land of Lamb. The ditch has been kept open ever since, until obstructed by the defendant, who now owns the land. In 1820, Cosnahan died, leaving a widow and infant children his heirs at law, one of whom was not of age until 1841. In 1833, the land was sold, under a decree of the Court of Equity, for partition, and purchased by one E. Cosnahan, from whom, by several

intermediate conveyances, the defendant derives his title. The question arising on these facts is, whether the plaintiff, who is the owner of Lamb's land, to drain which the ditch was dug, has acquired, by the use thereof, a right of drainage against the owner of the land. There is no doubt that, according to our law, as declared in a great many cases, the adverse use of an easement for twenty years will confer a right to the use of it, as fully as if a deed for it were produced and proved. In the ordinary transactions of mankind, we find that men are not disposed to allow others to exercise dominion over their property. When, therefore, we find that such dominion has been exercised for a long period, without objection on the part of the owner, it is reasonable to conclude that such use began in right, or it would have been objected to. This title is founded on the presumption of a grant, which time or accident has destroyed. But this is perhaps a legal fiction, which the law resorts to, to support ancient possessions, and to maintain what the acts of the parties show they considered to exist.

There can be no doubt that, if Cosnahan had lived for twenty years after the use of the ditch commenced, and Lamb had used it adversely, as the jury have found, the right would have been perfect; and I suppose it equally clear, that if the time before Cosnahan's death, added to the time which elapsed after the sale in 1833, together, made the full period of twenty years, the right would be beyond dispute. For in both cases there would be an adverse use, and an acquiescence by those laboring under no disability, for the full period that the law requires to support the presumption of a grant.

In this case these two periods of time amount to only seventeen years, and unless the presumption can arise against the infants, the twenty years is incomplete.

In McPherson on Infants, it is said, (p. 538,) "It is a maxim of law, that laches is not to be imputed to an infant, because he is not supposed to be cognizant of his rights, or capable of enforcing them." In Bacon's Abridg. Title, Infant, G. (5 vol. 110), last edition, it is said: "The rights of infants are much favored in law, and regularly their laches shall not prejudice them, upon the presumption that they understand not their rights, and that they are not capable of taking notice of the rules of law so as to apply them to their advantage." The same doctrine is to be found in all the elementary writers from Coke to the present time. The presumption arises from the acquiescence of the parties interested to dispute it, and it would be difficult to assign a reason for drawing any conclusion from the acquiescence of an infant, who is supposed in law not to be cognizant of his rights, or capable of enforcing them. Accordingly we find, that in all the cases which have been decided, so far as I know, no presumption has been allowed against the rights of an infant, whether the question related to the satisfaction of bonds for the payment of money, or the performance of other acts, or to rights growing out of what Best calls a *non-existing grant*.¹ In

¹ Best on Presump. p. 102 *et seq.*

Boyd v. Keels, decided in 1830, it was held that no presumption could arise that the condition of a bond of an administrator had been performed, because the distributee, to whom he was to account and pay over the money, was an infant. The same was affirmed in the case of *Brown v. McCall*, 8 Hill, 385. In *Gray v. Givens*, 2 Hill, Ch. R. 514, Judge Harper says, "I think it has not been questioned, that the time during which the party to be affected has been under disability, must be deducted in computing the lapse of time, in analogy to the Statute of Limitations. Such was the case in *Riddlehoover v. Kinard*, 1 Hill, Ch. R. 375. If the possession were taken in early infancy, the title might be matured before the infant arrived at age, and before the Statute of Limitations had begun to run against him. The decisions have been numerous, and the practice habitual, and I am not aware of any doctrine or decision to the contrary." We have no case involving the right to an easement, in which the question involved in this case has been decided by this court. In *Watt v. Trapp*, 2 Rich. 136, Judge O'Neill, on the circuit, expressed the opinion to the jury, that the presumption of a grant to a way would be arrested by infancy. But that point was not necessarily involved in the case, and this court declined to express any opinion, as, according to my recollection, it was not argued. In other States the question has been decided. In the case of *Watkins v. Peck*, 13 New Hamp. R. 360, it was held, that a grant cannot be presumed from the use and enjoyment of an easement for the term of twenty years, when the party, who must have made the grant if it existed, was an infant at the time of making it. This does not come up fully to the case under consideration, because in this case the grant, if any, must have been made coeval with the use, and that was in the lifetime of Cosnahan, who was adult. But that can make no difference, unless we apply the rule, which has been adopted in relation to some of the clauses of the Statute of Limitations, viz., that where the Statute begins to run, it will not be arrested by any intervening disability. But this has not been contended for, and there is no semblance of authority to support it. This construction arises on a positive enactment, that the action must be within four years from the time the right of action accrued; whereas presumptions arise from the assertion of the right, and the acquiescence in it, during the whole period of twenty years, and how can it be said that the infants have acquiesced, when they were incapable of asserting their rights?

But the case of *Melvin v. Whiting*, 13 Pick. R. 190, was a case of intervening infancy. The plaintiff claimed title to a several fishery, on the defendant's soil, and relied, to support his title, on proof of an adverse, uninterrupted, and exclusive use and enjoyment for twenty years. The jury were instructed by the Chief Justice that, to raise such a presumption of conveyance, it must appear that such exclusive right had been used and enjoyed against those who were able in law to assert and enforce their rights, and to resist such adverse claim, if not well founded; and, therefore, if the persons against whom such adverse

right is claimed, were under the disability of infancy, the time during which such disability continued, was to be deducted in the computation of the twenty years; and this construction was supported by the Court of Appeals. The only *dictum* which I have found to the contrary, is contained in the opinion of Judge Story, in the case of *Tyler v. Wilkinson*, 4 Mason, 402. The action involved the priority of right to use the water in Pawtucket River, and in no way involved the question of the rights of infants. The question which he was discussing was, whether the presumption from adverse use was a *presumptio juris et de jure*, a question of law to be decided by the court, or a fact to be determined by the jury. In support of his argument, that it is a *presumptio juris*, he says the right by presumption of a grant is not affected by the intervention of personal disabilities, such as infancy, coverture, and insanity. This *dictum* is noticed and disregarded in the New Hampshire case above referred to, and I may be permitted to say, without any disrespect to that great and learned judge, that he did not bear in mind the distinction between a right claimed by prescription, and a presumption of right from a non-existing grant. The former requires a use beyond legal memory, the latter may arise within twenty years. Best on Presump. § 88; 3 Stark. Ev. 911, 8d ed.; 2 Ev. Poth. 189.

We are of opinion, that the period of time during which the infant heirs of Cosnahan were the owners of the servient tenement, is not to be computed as a part of the twenty years' adverse use necessary to vest the easement in the plaintiff, and upon this ground the plaintiff should have been nonsuited on the circuit. It is therefore ordered that the verdict be set aside, and the defendant have leave to enter up a judgment of nonsuit.

O'NEALL and FROST, JJ., concurred.

*Motion granted.*¹

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TRACY v. ATHERTON.

SUPREME COURT OF VERMONT. 1864.

[Reported 36 Vt. 508.]

TRESPASS on the freehold. Plea, the general issue and a special plea justifying the trespass under an alleged private right of way, and also a highway. Trial by jury, April Term, 1862, *Pierpoint*, J., presiding.

The testimony tended to show that one Penniman was the owner of a piece of land, adjoining the close described in the declaration, from some time prior to the year 1828, until June, 1854, when he sold and conveyed it to one Batchelder; that Batchelder sold and conveyed it to Barber, about the year 1858; and that at the time of the committing of the trespasses in question, the defendants were jointly occupying said land under a contract with Barber for its purchase. That prior

¹ See *Hodges v. Goodspeed*, 20 R. I. 537 (1898).

to the year 1828, one Jones was the owner of the close mentioned in the declaration, and remained so until the 5th of November, 1833, when, with the knowledge of Penniman, he sold and conveyed it, by deed of warranty, to Griswold W. Tracy, the plaintiff's father, who continued to own and occupy it until the time of his decease, on the 7th of September, 1837. It did not appear that Penniman was present when the deed was executed, or that he knew that the conveyance was by deed of warranty. That at the decease of Griswold W. Tracy this close descended to the plaintiff as heir of Griswold W., and that he has ever since continued to be the owner of it. That at the time of the decease of Griswold W., the plaintiff was a minor, and remained so until the 27th of September, 1853, when he arrived at majority. That for many years prior to the year 1828, there was a public and open highway leading through the close described in the declaration, and through the land so owned by Penniman, which highway was discontinued and fenced up in the summer of 1828, and has so remained ever since. That at or about the time of the discontinuance of this highway, and as a part of the arrangement for throwing up the highway, Penniman having no other means of access to his land, it was orally agreed between Penniman and Jones, that if it was discontinued, Penniman should always have the privilege of passing from the main road to and from his land over the land of Jones, at the place where the highway then was, and in as ample a manner as he had before. That Penniman, his tenants and grantees, down to the time the Penniman lot passed to the defendants, were in the habit frequently, as they had occasion, of passing over the *locus in quo* with teams, cattle and sheep, without asking or obtaining permission and without any express assertion of a right so to do, but under a claim of right; and that they kept this way in repair.

It appeared that in October, 1837, Mrs. Sarah Tracy, plaintiff's mother, (who, from the time of the death of her husband, always lived with the plaintiff,) was appointed guardian of the plaintiff, and acted as such during his minority; and it also appeared that on the 24th of December, 1850, Penniman wrote and caused to be delivered to Mrs. Tracy, the following letter, to wit: —

December 24, 1850.

MRS. TRACY — *Madam*. My men that are drawing wood, wish to go through your lots. If you will let them pass, I will pay you any reasonable sum you or your neighbors may say.

Respectfully,

A. H. PENNIMAN.

The testimony of Mrs. Tracy, who was called as a witness by the plaintiff, tended to show that she supposed, from the letter itself, that it had reference to the place where the highway formerly crossed the close mentioned in the declaration, and where Penniman and his tenant had been accustomed to pass. But Penniman testified that the letter referred to a different place, and that a different place was used on that

occasion. The plaintiff's testimony further tended to show that soon after the conveyance by Penniman to Batchelder, the plaintiff gave permission to Barber, (who had the principal care of the Penniman lot for Batchelder while he owned it,) to take cattle and sheep across the plaintiff's land upon the application of Barber, and refused to grant any privilege to one of the defendants soon after they commenced occupying the Penniman lot.

The plaintiff's testimony further tended to prove that the defendants had driven their stock across the *locus in quo* daily previous to the commencement of this suit.

The defendants' evidence tended to show that their use, and that of those under whom they claimed, was always adverse, continuous, without license and under a claim of right, and applied to any species of use connected with the use of the farm.

The plaintiff requested the court to charge the jury (among other things,) that the infancy of the plaintiff, from the time he became the owner of the *locus in quo* until the 27th of September, 1853, would, if the fact was found, operate as an interruption of the adverse uses of the way by Penniman, and that in determining the question of a prescriptive right to the easement claimed by the defendants, only the time which elapsed after the plaintiff's majority could be considered. Or that if such infancy did not wholly defeat the effect of the previous uses of the way by Penniman, the time during which the infancy existed should be deducted from the whole time of user, and that if after such deduction the adverse enjoyment of the way had not continued for fifteen years, no right could be presumed.

That every renewal of a license to pass across the plaintiff's land at the place in question; every application for such renewal, by the defendants or those preceding them in the chain of title to the Penniman lot; and every admission by the defendants or by their predecessors in the title to said lot, that the use of the way in question had been by the license, consent or indulgence of the owners of the servient close, would conclusively rebut the presumption of a grant; and that the previous enjoyment of such way had been under a claim of right, however long such previous enjoyment might have continued.

The court declined so to instruct the jury, except as follows:—

The court instructed the jury particularly as to what it was necessary for the defendant to prove, to establish in himself the right of way claimed; to which no exception was taken.

The court told the jury that if Penniman, while he owned the farm now owned by the defendant, and before the right of way had become established and vested in the owner of such farm, applied for and obtained a license from the owner or occupier of the Tracy lot, to pass over the place in question, such fact would prevent his acquiring a right of way by any subsequent user, and defeat the claim now set up by the defendant; and the same would be the case in respect to any other owner of said farm. But if the jury found that the right had

become established and vested in the owner of said farm by such a use of the way, and for such a period as the court has told them was necessary, a subsequent application, by such owner, for leave to pass over the place in question, and a license given accordingly, would not divest the right and defeat the claim. But that in determining whether the right had become established, such an application, made after the lapse of the required period, would be an important matter for them to consider, in determining whether the use of the way had been of such a character as the court had told the jury was necessary to establish the right. That if Penniman, in his letter of the 24th of December, 1850, referred to a different place from the way in question, such an application would have no effect in this case, even though Mrs. Tracy supposed he referred to the place in question.

The plaintiff excepted to the refusal to charge as requested, and to the charge as above detailed.

M. L. Bennett and E. R. Hard, for the plaintiff.

George F. Edmunds and J. French, for the defendants.

POLAND, C. J. The great question in this case is, what effect the infancy of the plaintiff has upon the right of way claimed to have been acquired over the plaintiff's land, by the defendants and their predecessors in title, by prescription, or adverse possession for a period of more than fifteen years. It is now claimed that the jury should have been directed to find on the evidence whether the adverse use of the way began before the land descended to the plaintiff, and should have been instructed on the law of the case on the theory of finding that the adverse use began after the land descended to the plaintiff, and during his infancy. But it appears from the case that the testimony tended to show that the use of the way began as early as 1828, by Penniman, and under a claim of right, in pursuance of the agreement made when it was discontinued as a highway. It does not appear that any evidence was given tending to contradict this; indeed it rather appears that this commencement of the use was shown by the plaintiff's own evidence. None of the requests made by the plaintiff's counsel to the court point to any such state of the case, so that we can only consider this as one of those common efforts to raise a question in this court on exceptions, which was not made at all in the court below.

It must be taken, then, under the finding of the jury, that the use of the way began before the estate descended to the plaintiff, and that it was continued under a claim of right, and without interruption, for more than fifteen years; but that during this period the title came to the plaintiff, who was an infant, and so continued from 1837 to 1853; so that, if the plaintiff was right in his request, that the jury should be charged that only the time after the plaintiff became of age should be reckoned, there was nothing for the jury to consider, and if he was right in his request that the period of his nonage should be deducted, then the jury should have been directed to find whether the use of the way before, and after the disability, was sufficient to make the requisite period.

We understand the case to have been submitted to the jury on this ground: that if the adverse use of the way began during the life of the plaintiff's father, or his grantor, and was continued for the period of fifteen years, without interruption, the right was acquired, though before the expiration of the fifteen years the land over which the way was used, descended to the plaintiff, who was an infant.

The question arises on the correctness of this instruction. The Statute of Limitations does not extend to these incorporeal rights, but it has now become universally settled that an uninterrupted use of a way or other easement, under a claim of right, for the period of time fixed by the Statute as a bar to the recovery of lands held adversely, gives the person so using it a full and absolute right to such easement, as much as if granted to him. This has been settled by a long course of judicial decisions, and is founded primarily on the ancient doctrine of prescriptions, but has finally by the courts been made to conform, by analogy, to the Statute of Limitations applicable to lands, in all substantial particulars, so far as the difference in the subjects will allow.

The general language of the books, found in innumerable cases, is that from such a possession, continued for the period of the Statute, the law will presume a grant, or courts will direct juries to presume a grant. But this is purely a legal fiction. The doctrine proceeds wholly upon the ground of presuming a right after such length of possession, and not at all upon the ground that there ever was a grant made, but which has been lost, and though it may be shown ever so clearly that no grant was ever made, the case is not at all varied.

A great deal of learning has been expended upon the question whether, in such case, the presumption arising from the length of possession is a presumption of law, or one of fact, and all the cases on the subject have been industriously brought to our attention in the argument of this case.

The counsel for the plaintiff say that this presumption of a grant from such long possession is a presumption of fact, to be found by a jury from such possession, unless rebutted, and that therefore any evidence which tends to show that no such grant was made, or could have been made, is admissible, and should be submitted to the jury. If it were true that such was the real ground upon which these rights are sustained, the view of the counsel would be unanswerable. But the counsel themselves do not claim that this grant which is presumed is anything but mere fiction. The true view of the subject is well stated by Wilde, J., in *Coolidge v. Learned*, 8 Pick. 504. He says: "It has long been settled, that the undisturbed enjoyment of an incorporeal right affecting the lands of another for twenty years, the possession being adverse and unrebutted, imposes on the jury a duty to presume a grant, and in all cases juries are so instructed by the court. Not, however, because either the court or jury believe the presumed grant to have been actually made, but because public policy and

convenience require that long-continued possession should not be disturbed."

It is said in many of the cases that this length of possession is only evidence to be submitted to the jury. If by this is meant, that where it is conceded or proved that there has been an uninterrupted possession under claim of right for the requisite time, and this is not encountered by any evidence to rebut the legal effect of it, that it is a proper question to be submitted to the jury to say whether this gives a right, or not, it is not in our opinion correct.

If there be any conflict of evidence as to the length, or character of the case, or any evidence proper to rebut the acquiring the right, it then becomes proper to submit it to the jury. But where it stands solely upon the conceded or proved possession under claim of right for the requisite time, it is never submitted to a jury to find the right established or not, according to their judgments. And whether it is more proper for the court to tell the jury that it is their duty from this to presume a grant, or to tell the jury that from this the law presumes a grant, is mere idle speculation. In fact, and in substance, it is a verdict directed by the court, as a matter of law. And if it were submitted to the jury, and they were to return a verdict against the right, no court would ever accept the verdict.

Mr. Washburn, who reviews all the decisions on the question whether the presumption to be drawn from possession or use of an easement for the required time, is one of law, or one of fact, and who gives the weight of his opinion in favor of its being a presumption of fact for the jury, after all, says: "It may, therefore, be stated as a general proposition of law, that if there has been an uninterrupted user and enjoyment of an easement, a stream of water, for instance, in a particular way, for more than twenty-one, or twenty, or such other period of years as answers to the local period of limitation, it affords conclusive presumption of right in the party who shall have enjoyed it, provided such use and enjoyment be not by authority of law, or by or under some agreement between the owner of the inheritance and the party who shall have enjoyed it." Wash. on Eas. &c. 70.

In the case of *Townsend v. Downer*, 32 Vt. 188, Aldis, J., in giving the judgment of the court, says: "When from long possession, with or without auxiliary circumstances, a grant is presumed as *matter of law*, and without regard to the fact whether such a grant was really made or not, then it may with the strictest propriety be said that the law presumes a grant. In such a case, under the practice in this State, it would be the duty of the court to direct a verdict."

He then proceeds to speak of the class of cases where lapse of time and long possession is relied on with other circumstances, as evidence to establish that a grant has been made in *fact*. The opinion then proceeds: "We do not understand that there is still a third class of cases in which, although the grant is not presumed by the court as pure matter of law, and is not found by the jury as a fact, still the court

may direct the jury to presume a grant, and thus by the intervention of the jury, but without the exercise of their judgment upon the evidence, establish the grant as if it were a mere inference of the law. Language may be found in some books and decisions favoring such a view, but the doctrine is clearly against the whole current of English and American decisions, and tends to confound the proper and separate jurisdictions of court and jury. This erroneous view, we think, has arisen from the want of precision in language, when treating of presumptive evidence and the grants proved by or presumed from it."

We think therefore, that in substance the presumption arising from such long-continued possession, un rebutted, is a presumption of *law*, and that it is conclusive evidence, or sufficient evidence to warrant the court in holding that it confers a right on the possessor to the extent of his use.

But it does not in our opinion go very far in determining the question in this case, whether the presumption arising from the length of possession is one of law, or one of fact, for whichever it may be it is liable to be rebutted in various ways. It may be shown to have originated or continued by leave of the owner; that it has not been under a claim of right, or not continuous; or that it has been interrupted by the owner of the land, and whenever any evidence is introduced tending to invalidate the right claimed, on any of these grounds, that the case becomes a proper one to submit to the jury.

But all authorities concur in saying that this doctrine has been adopted and rests upon its analogy to the Statute of Limitations applicable to lands, and both parties in the present case agree that the effect of the plaintiff's disability upon the right claimed by the defendants, is precisely the same that it would be upon lands of the plaintiff holden adversely by the defendants, and their predecessors in title, during the same period. And in our judgment rights to easements acquired by long possession ought to stand on the same ground as rights by possession in lands. The real principle underlying the right, is the same precisely on which the Statute of Limitations stands. In the first place, it is presumed that one man would not quietly submit to have another use and enjoy his property for so great a length of time unless there existed some good reason for his doing so, and that after allowing it for so long, he should not call upon him to show his right or title, when it may not be in his power to do so; and in the second place, it is a rule of policy, adopted in support of long and uninterrupted possession. It is important too in another view, that the doctrine of the law in the two cases should harmonize, that the people may not be misled and perplexed by having the law different ways upon subjects which in reason and upon principle should be the same.

The requisites of a possession by which an easement is acquired, as generally laid down in the books are, that it should be adverse, under a claim of right, exclusive, continuous and uninterrupted. These are

exactly the requisites of a possession of lands to give a title under the Statute of Limitations against the proprietor. But it is sometimes said that the possession must be with the acquiescence of the owner. But this is the same as saying that the possession must be *uninterrupted*. If the owner does not interrupt the possession in any way, he does acquiesce as far as is needful in order to make the possession effectual against him. In the case of lands which are wholly in the possession of a disseisor, in order to make an effectual interruption of the possession, the owner must actually make an entry on the land for that purpose. In *Powell v. Bragg*, 8 Gray, 441, it was decided, that where the owner of the land, over which another had laid an aqueduct, and claimed to have acquired a right by possession upon the land, forbid the owner of the aqueduct from entering upon the land to use the aqueduct, this was such an interruption of the use as prevented the acquirement of an easement right. The owner of the land, being already in possession, could not make an entry to stop the effect of the user, or possession, and his act on the land, of forbidding the other to enter and use the aqueduct, was all he could do to prevent him unless he resorted to force, and ordinarily the law does not require one to use force to assert his rights.

In the case of an entry on land to interrupt the acquiring a right by a disseisor, the owner is not required to use force in order to give legal effect to his entry.

It is not necessary to determine whether such an interruption as was shown in *Powell v. Bragg* would be sufficient to stop the effect of a previous use toward acquiring a right by prescription, but the decision is founded apparently on a sound distinction between an actual adverse possession of lands, and a mere easement upon lands, of which the owner himself is in the actual possession.

Under the English Statute of Limitations, passed as early as the reign of James I., it was uniformly held that disabilities, in order to prevent the operation of the Statute, must exist at the time the right first accrued.

This Statute of James has been the foundation of similar Statutes in this country generally, and though its precise language has hardly ever been adopted, still, the same construction has been generally followed by American courts. The only instance of so wide a departure from the English Statute as to induce a different construction in this respect is in the State of Kentucky. But the saving in the Kentucky Statute is in favor of those "who are or shall be infants, &c., at the time when the said right or title accrues or comes to them." The counsel for the plaintiff claim that our Statute of Limitations of 1797 varies so widely from the English as to require a different construction in this respect, and one similar to that given by the Kentucky court to theirs.

The Act of 1797 limits rights of entry into lands, and actions for the recovery of lands, to fifteen years next after the right shall accrue to

the plaintiff or those under whom he claims. Sect. 10 provides, generally, that it shall not apply to infants, etc., but they shall be allowed to sue within fifteen years after the removal of the disability. It does not say, in terms, that the rights of those disabled when the right *first* accrued shall be saved, as does the English Statute. Neither does it, in terms, save the rights of those who shall be infants, &c., when the right accrues or comes to them.

But the question cannot be regarded as an open one in this State. In *McFarland, Adm'r of Burdick, v. Stone*, 17 Vt. 174, the question came before the court. The action was ejectment to recover lands of which Burdick died seised. The defendant had been in possession more than fifteen years before suit brought claiming title. The plaintiff claimed to avoid the Statute on the ground of the disability of the heirs. Two of the heirs were infants at the decease of their father, and fifteen years had not elapsed after they became of age before the suit was brought, and the plaintiff was allowed to recover for their shares of the land. Two other female heirs were infants when the defendant entered upon the land, and before they became of age were married, and so continued till suit brought, so that they had been constantly under disability during the whole period of defendant's possession. The Statute had not run in favor of defendant when the disability of coverture intervened, but more than fifteen years had run after they became of age, before suit brought.

It was decided that their rights were bound by the Statute, and the court held that our Statute should have the same construction as the English, and that no disabilities could be regarded as within the saving, except such as existed at the time the right *first* accrued. If the plaintiff's claim is well founded, that the intervening of a disability, before the Statute has run, arrests it, and entitles the party to fifteen years longer after the disability is removed to sue, then the plaintiff should have recovered the shares of the two female heirs. They could not be in a worse condition after the disability of coverture arose, in consequence of having been all the previous time under the disability of infancy, than they would have been, if before the coverture they had been legally competent to sue, or the right had been in some one else who was competent. The real point in the case was the same made here, viz.: Must disabilities, in order to be within the saving of the Statute, exist when the right first accrues? — and was fully decided. It was stated in argument by Judge Bennett, that the Statute of 1797 was always understood by the courts, and men of eminence in the legal profession in the State, to be different from the Statute of James in this respect. Judge Bennett's long experience at the bar and upon the bench, entitles his statement to great consideration, but the strictest search has not enabled us to find any trace of such an opinion in our reports, and the case of *McFarland v. Stone*, where the contrary was decided, was tried by Judge Bennett, and his ruling was affirmed in the Supreme Court. So far as we have any knowledge of professional

tradition on the subject, the general understanding has been that when the Statute of Limitations once began to run, no subsequent intervening disability would arrest it.

Our present Statute of Limitations is made to conform exactly to the English, by confining the saving of disabilities to such as exist at the time the cause of action accrues, but no one has ever supposed that the law in this respect was changed from what it was under the Act of 1797. Indeed the change of phraseology has been made by revisers, and for the purpose of making the language more exactly express the meaning as judicially determined.

The decisions in relation to the Statute applying to personal actions are all in the same direction. *Hill v. Jackson*, 12 Vt. We are satisfied therefore, that by the settled construction of the Statute of Limitations, a disability in order to prevent the operation of the Statute must exist when the right *first accrues*, and if the analogy of the Statute in this respect is to be followed, it must govern this case. And we see no reason why it should not be in this particular, if in any, as it stands upon the same reason and is governed by the same policy.

The cases that have been cited bearing upon this particular point are contradictory, and no uniform principle seems to have been followed in deciding them. *Melvin v. Whiting*, 13 Pick. 134, is cited by the plaintiff. It was an action for disturbing the plaintiff's fishery. The plaintiff claimed a right to the fishing by long-continued use or prescription. It appeared that after plaintiff's possession commenced, the title under which defendant claimed, became vested in some infant heirs. It was held that the period of minority should be deducted, but as the plaintiff's possession, before the commencement, and after the expiration of the disability, added together, made the requisite length, according to the Statute of Massachusetts, the plaintiff's right was held to be established, and he was allowed to recover. The case seems to have been very little examined by court or counsel, no reasons are given, or authorities cited.

Watkins v. Peck et al., 13 N. H. 860, is also cited by plaintiff.

This was a case in chancery, involving in controversy the right to draw water by aqueduct from a spring. In this case also, during the use from which the right was claimed, the title had descended to minor heirs, and it was held that this interrupted the prescription. Judge Parker, who gave the opinion, says that such a right by long possession rests upon the presumption of a lost grant, and that it would be absurd to presume a grant, where it was clear that no such grant could have existed.

It would almost seem that the distinction between the class of cases where the question is whether there has been a *grant* or *deed in fact*, and those where this presumption is a *mere legal fiction*, was not perfectly clear to so eminent a judge as Judge Parker.

Lamb v. Crosland, 4 Rich. S. C. 536, is also cited by Prof. Washburn, as supporting the same doctrine, but I have not seen the case.

On the other hand the case of *Reimer v. Stuber*, 20 Penn. St. 458, where a right of way was claimed by prescription, and sought to be avoided on the ground of disability, the use began during the minority of the owner of the land, and who before she became of age was married, it was held that the time began to run when she became of age, notwithstanding the subsequent disability of coverture. If the case stood really upon the ground of a presumed grant, and it could not be presumed because the owner was under a disability, and could not make a grant, it must extend through both disabilities. The case can stand only upon the analogy of the Statute. In that view it is clearly correct.

Mibane v. Patrick, 1 Jones N. C. 23, was a claim by the plaintiff that he had acquired a right of way by use. After the use began the owner of the servient estate became insane. It was decided that as the disability did not exist at the time of the commencement of the plaintiff's adverse use, it did not prevent the use ripening into a right. The court say, "Such being the law as to the Statute of Limitations, it follows it must be so, in regard to prescriptions also." The language of Judge Story in *Tyler v. Wilkinson*, 4 Mason, 402, in this respect goes even beyond what we are disposed to hold, indeed disabilities coming clearly within the saving of the Statute, would not avoid a prescription, according to the most general interpretation of his language. But doubtless it was not intended by him to bear so broad a meaning. Prof. Washburn in his treatise on Easements says, "Perhaps the difference in the provisions of the Statutes of Limitations in the different States, may account for the discrepancy in the decided cases." But they can hardly be reconciled on such a basis. In both Massachusetts and New Hampshire, it is fully settled, that under their Statutes of Limitations no disability avoids their operation, unless it exist at the time the right *first accrues*. The decisions in those States must have been made in entire disregard of the analogy of the Statute in this respect, and we think they were made by giving undue importance to the fictitious theory of a lost grant.

The cases opposed to them are in our judgment founded upon much sounder legal reason, and we are disposed to follow the Pennsylvania and North Carolina cases, rather than those nearer home.

This disposes of the principal questions made in the case. The plaintiff claims there was error in the charge in another respect; that if they found the right of way claimed by the defendants fully established by the evidence as to the length and character of the use, any subsequent application for, and obtaining license to use it from the plaintiff, would not divest them of the right. Such subsequent application for license would be very powerful evidence to show that the previous use was not under a claim of right, so as to give a title, but no claim is made but that as evidence, it was given all the force it was entitled to.

But the plaintiff claims that it should have the effect of an estoppel,

and prevent the defendants from setting up the right of way they had obtained by the previous use. The claim is put upon the same ground as that of a tenancy, where if a tenant has been admitted into possession by the landlord, he is estopped to deny his title. But we fail to see the analogy, or any good ground upon which an estoppel could be founded. The charge proceeded on the basis that the jury had already found the right of way completely established. The right of the defendants then was the same as if they actually held a conveyance of the right from the plaintiff. In such case it would seem singular that a parol admission of the plaintiff's right, or rather the defendants' want of right, should operate really as a reconveyance of a vested legal right in realty, which cannot be conveyed by parol. We think it can be regarded merely as an admission to be weighed against the defendants and as such the defendants had the full benefit of it.

The only remaining point is the instructions as to the Penniman letter. The letter appears to have been introduced merely as an admission by Penniman of the title of the plaintiff, and his own want of title to any way over the plaintiff's land, by his asking permission to cross. If the letter referred to the way in question, it would be important evidence against his right. If it had reference to another place, and not to this, then it was no admission at all against his right to use this way. If the jury found that the letter referred to the way in question, it does not appear that the plaintiff did not have all the advantage he was entitled to from it, and if they found it referred to another place, and not this, then it was entitled to no force at all as an admission. It does not appear to us material how Mrs. Tracy understood the letter, considered in this light. If it was claimed that by her misunderstanding of the letter, and supposition that it referred to this way, she had conducted differently, and had allowed Penniman to use this way, supposing he was acting under the license obtained in answer to the letter, or omitted to put a stop to his use of it, supposing he acknowledged her right, or that of her son, then her misunderstanding of the letter might be important as explaining her own action. But nothing of this kind appears in the case. The letter was used to show that Penniman asked leave of Mrs. Tracy to use this way, thus acknowledging her right, and his own want of right. If he was speaking in the letter of another place, it was no acknowledgment at all as to this way, even if Mrs. Tracy by mistake supposed it was. We find no error, and the judgment is affirmed.¹

¹ *Wallace v. Fletcher*, 80 N. H. 434 (1855); *Ballard v. Demmon*, 156 Mass. 449 (1892), *accord*. See also *Edson v. Munsell*, 10 All. 557 (Mass. 1865).

173 LEHIGH VALLEY RAILROAD COMPANY v. MCFARLAN.

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1881.

[Reported 43 N. J. L. 606.]

ON error to the Supreme Court.

For the plaintiffs in error, *T. N. McCarter* and *F. T. Frelinghuysen*.

For the defendants in error, *H. C. Pitney* and *B. Gummere*.

The opinion of the court was delivered by

DEPUE, J. The defendant is the lessee of the Morris Canal and Banking Company. In 1871 the property, works, and franchises of the latter company were granted to the defendant by a perpetual lease, under the authority of an Act of the legislature. Pamph. L. 1871, p. 444.

The lessor was incorporated in 1824, for the purpose of constructing a canal to unite the River Delaware, near Easton, with the tide waters of the Passaic. Pamph. L. 1824, p. 158. The canal was constructed from the Delaware to the Passaic about 1830. In 1845 it was enlarged throughout its entire length, to provide for navigation with boats of greater capacity. In 1857 the company renewed the timbers in its dam across the Rockaway River and placed new flash boards upon it. In 1875 the flash boards were replaced by timbers firmly spiked on the top of the dam, and made part of its permanent structure.

The plaintiff is the owner of a mill situate on the Rockaway River, above the site of the dam. He complains of an injury to his mill by back water cast back upon it by means of the dam. The damages claimed are such as accrued between the 30th of December, 1876, and the 22d of September, 1877. As his declaration was originally framed, the theory of his action was that the dam at its increased height was an unlawful structure. At the trial the declaration was so amended as to present a claim for compensation for the damages sustained by the plaintiff between the days named, conceding that the canal company by its charter had power to take and appropriate to its use, lands and water, without compensation first made, and that therefore the dam was not, in itself, an unlawful structure.

[The learned judge first considered the question of compensation, and came to the conclusion that the plaintiff was entitled to it. He then continued:—]

The defendant also contended at the trial that the right to maintain its dam at its present height had been acquired by adverse enjoyment. If the defendant, or the canal company, under whom it claims, has acquired the right in dispute by prescription, the subject already discussed becomes of no importance in this litigation. It will be necessary, therefore, to examine the instructions of the judge on this head.

The instruction was, in substance and effect, that mere verbal protests and denial of the right, without any interruption or obstruction in fact, of the enjoyment of the right, would prevent the acquisition of an easement by adverse user. This instruction follows the opinion of the Vice-Chancellor, in *Lehigh Valley Railroad Company v. McFarlan*, 8 Stew. 180.

At common law there was no fixed period of prescription. Rights were acquired by prescription only when the possession or enjoyment was "time whereof the memory of man ran not to the contrary." By 20 Hen. III., c. 8, the limitation in writs of right dated from the reign of Henry II. By 8 Ed. I., c. 39, the limitation was fixed from the reign of Richard I. By 21 Jac. I., c. 16, the time for bringing possessory actions was limited to twenty years after the right accrued. These Statutes applied only to actions for the recovery of land; none of them embraced actions in which the right to an incorporeal hereditament was involved. But by judicial construction an adverse user of an easement for the period mentioned in the Statutes, as they were passed from time to time, became evidence of a prescriptive right; and finally, the fiction was invented of a lost grant, presumed from such user to have once been in existence and to have become lost. The fiction of a lost grant seems to have been devised after the Statute of James. It was called a lost grant, not to indicate that the fact of the existence of the grant originally was of importance, but to avoid the rule of pleading requiring profert. Allegation of the loss of the grant excused profert and bringing the instrument into court.

Whatever strictures may have been made upon this method of judicial legislation, the fiction has been promotive of beneficial results, and forms the basis of prescriptive titles, and it is now too late to question the validity of its introduction. The doctrine of lost grant forms part of the law of the land, and any dislike which may be felt for this and like fictions cannot be allowed to interfere with the carrying out of the doctrines involved in them to the full extent, which has been sanctioned by established authority. *Angus v. Dalton*, 4 Q. B. D. 161, *per* Thesiger, L. J.

At a very early period it was held that when by the Statute of Limitations the seisin in a writ of right was limited to the time of Richard I., although a man might prove to the contrary of a thing whereof the prescription was made, yet this should not destroy the prescription if the proof was of a thing before the said time of limitation. 2 Roll. Abr. 269; 17 Vin. Abr. 272, "Prescription," M. Afterwards, when the fiction of a lost grant was devised, there arose considerable diversity and fluctuation in judicial opinions as to whether an uninterrupted user for the period of limitation conferred a legal right or raised merely a presumption of title which would stand good until the presumption was overcome by evidence which negatived, in the judgment of juries, the existence of a grant. This state of the law produced great insecurity to titles by prescription, and subjected such rights to the whim and

caprice of juries. This evil was remedied by the later English authorities, which gave to the presumption of title arising from an uninterrupted enjoyment of twenty years the most unshaken stability, and made it conclusive evidence of a right. 3 Kent, 445. The judicial expression of opinion in England nearest to the time of the separation of the colonies from the mother country, is that of Lord Mansfield, in Cowper, 215, where he says that effect is given to the presumption, "not that in such cases the court really thinks a grant has been made, because it is not probable a grant should have existed without its being upon record, but they presume the fact for the purpose and from the principle of quieting the possession." The question has been set at rest in England by the Statute 2 and 3 William IV. But no one can examine the English cases for half a century preceding the Statute, without observing that the Statute in its main features was simply declarative of the law as expressed by the great weight of judicial opinions.

In this country the prevailing doctrine is, that an exclusive and uninterrupted enjoyment for twenty years creates a presumption, *juris et de jure*, and is conclusive evidence of title whenever, by possibility, a right may be acquired by grant.

In the class of legal presumptions established by judicial decisions which have become part of the common law of the land, and are imperative rules of law against the operation of which no averment or evidence is received, Prof. Greenleaf classes the presumption of a grant arising from an exclusive and uninterrupted enjoyment for the period of prescription. 1 Greenl. Ev., § 17. He also says that, by the weight of authority, as well as the preponderance of opinion, it may be stated as the general rule of the American law, that an enjoyment of an incorporeal hereditament, adverse, exclusive, and uninterrupted for twenty years, affords a conclusive presumption of a grant or a right, as the case may be, which is to be applied as a *presumptio juris et de jure*, wherever by possibility a right may be acquired in any manner known to the law. 2 Greenl. Ev., § 589. This passage is quoted and adopted by another distinguished writer on American law, as a correct exposition of the law on the subject. 2 Washb. on Real Prop. 449. This doctrine has the support of Mr. Justice Story, in *Tyler v. Wilkinson*, 4 Mason, 397, and is approved and enforced by Justices Wilde and Putnam, in the two leading cases of *Coolidge v. Larned*, 8 Pick. 508, and *Sargeant v. Ballard*, 9 Id. 251.

The difference between the English law, in the state it had reached before the Statute 2 and 3 William IV., and the American law, is slight. In England the presumption was dealt with as a presumption of fact; but for all practical purposes, it was a legal presumption, as it depended on pure legal rules. *Coolidge v. Larned*, per Putnam, J. Though the evidence of enjoyment was, in theory, presumptive evidence only of prescription, yet it was, in practice and effect, conclusive. Gale on Eas. (95), 149. At last the English Court of Appeals held that the

presumption arising from the uninterrupted enjoyment of an easement, operated as an estoppel by conduct, not conclusive, so far as to exclude denial or explanation of the conduct, but a bar to any simple denial of the fact, which is a mere legal inference drawn from such conduct; and consequently that the circumstance that no grant of the easement had been made was not material. *Angus v. Dalton*, 4 Q. B. D. 162.

In this State the law may be considered as settled in accordance with the prevailing doctrine in the courts of this country. In *Campbell v. Smith*, 3 Halst. 143, Chief Justice Ewing, speaking of a right acquired by adverse user, says: "Statutes of Limitation prescribing the time within which an entry shall be made into lands, tenements, or hereditaments, and within which every real, possessory, ancestral, mixed, or other action for any lands, tenements, or hereditaments shall be brought, are not deemed to comprehend in terms, and within their purview, the right now under consideration; but, upon the wise principle of such Statutes, and in analogy to them, to quiet men's possession, and to put an end and fix a limit to strife, a rule is established that, after the lapse of the period mentioned in those Statutes, a grant will be presumed, not, says Lord Mansfield (*Eldridge v. Knott*, Cowper, 214), that in such cases the court really thinks a grant has been made, but they presume the fact for the purpose of and from a principle of quieting the possession. The period of twenty years is settled in England, according with the time mentioned in the Statute of 21 Jac. I. Our Statute prescribing a like period, our rule is the same." This passage was quoted by Chancellor Vroom, in *Shreve v. Voorhees*, 2 Green's Ch. 32, as a correct expression of the law of New Jersey. The same principle was adopted by Chancellor Pennington, in *Shields v. Arndt*, 3 Green's Ch. 247; by Chancellor Zabriskie, in *Carlisle v. Cooper*, 4 C. E. Green, 259; and by the Supreme Court, in *Wood v. Hurd*, 5 Vroom, 87. In the case last cited, Mr. Justice Van Syckel, in discussing the kindred subject of a dedication to the public acquired by user, says that "mere acquiescence for twenty years, unaccompanied by any act which repels the presumption of such intention" (to dedicate) "is conclusive evidence of abandonment to the public."

The owner of the servient tenement cannot overcome the presumption of right arising from an uninterrupted user of twenty years, by proof that no grant was in fact made. He may rebut the presumption by contradicting or explaining the facts upon which it rests; but he cannot overcome it by proof in denial of a grant. He may show that the right claimed is one that could not be granted away, or that the owner of the servient tenement was legally incapable of making, or the owner of the dominant tenement incapable of receiving such a grant. *Rochdale Canal v. Radcliffe*, 18 Q. B. 287; *Ellwell v. Birmingham Canal*, 3 H. of L. 812; *Staffordshire Canal v. Birmingham Canal*, L. R. 1 H. of L. 254; *Thorpe v. Corwin*, Spenc. 312. He may explain the user or enjoyment by showing that it was under permission asked and granted; or that it was secret and without means of knowledge on his

part; or that the user was such as to be neither physically capable of prevention nor actionable. *Chasemore v. Richards*, 7 H. of L. Cas. 349; *Webb v. Bird*, 13 C. B. N. S. 841; s. c. 10 C. B. N. S. 268; *Sturges v. Bridgman*, 11 Ch. Div. 852. But if there be neither legal incompetency nor physical incapacity, and the user be open and notorious, and be such as to be actionable or capable of prevention by the servient owner, he can only defeat the acquisition of the right on the ground that the user was contentious, or the continuity of the enjoyment was interrupted during the period of prescription.

In defining title by prescription, Sir Edward Coke says, both to customs and prescriptions, these two things are incidents inseparable, viz., possession or usage and time. Possession must have these qualities: It must be long, continual, and peaceable; long, that is, during the time defined by law; continuous, that is, that it may not have been lawfully interrupted; peaceable, because if it be contentious, and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. Co. Lit. 113 b. By a long course of decision, the word "interrupted," when applied to acts done by the servient owner, has received a fixed meaning as indicating an obstruction to the use of the easement, some act of interference with its enjoyment, which, if unjustifiable, would be an actionable wrong. This meaning has been given to the word as used in the Statute 2 and 3 William IV. (Parke, B., in *Olney v. Gardner*, 4 M. & W. 495), and is its usual signification.

Sir Edward Coke gives no illustration of what was meant by contentious, except "opposition on good grounds," and by a quotation from Bracton, who wrote in a primitive era of English law, before the doctrine of prescription, as applied to incorporeal hereditaments, had been subjected to the formative processes of judicial expositions from which the present state of the law is derived. The expression "opposition on good grounds" implies an act which would afford an opportunity to submit its validity to the test of judicial decision, and is more consistent with the idea of an interference with the enjoyment of the right, such as would give the owner ability to go into court and establish his right, than with the supposition that prescriptive rights should be forever kept in abeyance by acts which gave persons claiming them, no power by suit at law to establish the right. In the passage quoted by Coke from Bracton, this early writer says: "I use the term peaceable, because if it be contentious, it will be the same as before, if the contention has been just; as if the true lord forthwith, when the intruder or disseisor has entered into seisin, endeavors soon and without delay (if he should be present, or if absent when he shall have returned) to repel and expel such persons by violence, although he cannot carry out to its effect what he has commenced, provided, however, when he fails he is diligent in requesting and in pursuing." Bract., fols. 51, 52. Mr. Goddard, in discussing an enjoyment which is not peaceable, defines *vi* in the phrase *vi, clam aut precario*, to mean violence or force

and strife, or contention of any kind; and the illustration he gives is where the enjoyment has been during a period of litigation about the right claimed, or the user has been continually interrupted by physical obstacles placed with a view of rendering user impracticable. Goddard on Eas. 172. In the English cases, peacefulness and acquiescence (when the servient owner knows or might have known that a right is claimed against his interest) are used indifferently as equivalent to uninterrupted.

In this country several decisions have been referred to as holding that prohibitions, remonstrances, and denials of the right by the owner of the servient tenement, unaccompanied by any act of interference with the enjoyment of the easement, will prevent the acquisition of the right. These cases are a legitimate outcome of the doctrine that the presumption is not a presumption *juris et de jure*, but is a presumption merely, liable to be rebutted by the proof of circumstances overcoming the presumption of a grant. This doctrine is supposed to have its chief support in *Powell v. Bagg*, 8 Gray, 441.

In *Powell v. Bagg*, proof that the owner, when on the land, forbade the party claiming an easement of the flow of water over his premises to enter, and ordered him off, while there for the purpose of repairing the aqueduct, was adjudged to be competent evidence of an interruption, and an instruction that words, however strongly denying the right claimed or forbidding its exercise unaccompanied by any act or deed, was not an interruption of the user or enjoyment, was held to be defective and tended to mislead the jury. The evidence before the trial court is not fully reported. Evidence that the owner of the land forbade the other party to enter, and ordered him off, was undoubtedly competent as part of the plaintiff's case. Whether what occurred at that time would amount to an interruption of the easement, would depend upon circumstances, upon the conduct of the party when forbidden to enter or when ordered off. If the owner of the servient tenement, being on the premises, forbids the owner of the easement to enter for the purpose of enjoying it, and orders him off, and the latter, on a well-grounded apprehension that the former means to enforce obedience to his commands, desists and withdraws, an action on the case for disturbance of the right would lie. This view must have been present in the mind of the court, else why restrict the prohibition to place — on the land? To give certainty to the owner's purpose? A prohibition delivered elsewhere might be so vehement and emphatic as to leave the denial of the right equally beyond a doubt. On any other view of the case, as was said in *C. & N. W. R. R. Co. v. Hoag*, 90 Ill. 340, "the circumstances of the place where the forbiddance was made, whether on or off the land, would be immaterial." If facts such as are above indicated appeared in the case, the charge was, in the language of the court, "defective, and tended to mislead the jury in applying the evidence to the rule of law upon which the title of the defendant to the easement rested." Certain expressions

from the opinion have been quoted as indicating that a verbal denial of the right will operate, *ipso facto*, to determine the right. If that view be adopted, or the suggestion of Mr. Justice Woodbury (*Stillman v. White Rock Mfg Co.*, 3 Woodb. & M. 551), that complaints and the taking of counsel against such encroachments will bar the right, be followed, it is obvious that rights by prescription will be of little value.

None of the authorities cited by the learned judge in *Powell v. Bagg* goes to the extent contended for. The passage quoted from Bracton, that an easement will be acquired by its exercise under a claim of right *per patientiam veri domini qui scivit et non prohibuit sed permisit de consensu tacito*, is followed by the comment that sufferance is taken for consent, and that if the lord of the property, through sufferance, has, when present and knowing the fact, allowed his neighbor to enjoy on his estate a servitude for a long time peaceably and without interruption from such enjoyment and sufferance, there is a presumption of consent and willingness. Bract., lib. 2, c. 23, § 1. In the passage referred to in Greenleaf, the language is that the user must be adverse — that is, under a claim of title — with the knowledge and acquiescence of the owner of the land, and uninterrupted. 2 Greenl. Ev., § 539. In *Sargeant v. Ballard*, 9 Pick. 254, 255, Wilde, J., in discussing the methods by which a claim of title by prescription may be controverted by disproving the qualities and ingredients of such a title, says that "evidence might be given to prove that the use had been interrupted, thereby disproving a continued acquiescence of the owner for twenty years." In *Arnold v. Stevens*, 24 Pick. 112, the plaintiffs' claim was of a right to dig ore under a grant by deed. They had not exercised the right for forty years. In the mean time the owner had occupied and cultivated the surface of the land. The court held that there was no enjoyment hostile to the easement, for the owner of the land had done "nothing adverse to the rights of the owners of the easement — nothing to which they could object, or which would apprise them of the existence of any hostile claim, and no acquiescence, therefore, existed from which a conveyance could be presumed." In *Monmouthshire Canal Co. v. Harford*, 1 C. M. & R. 614, evidence was given of applications made on behalf of the claimants of the easement for permission to exercise the right. The court held that permission asked for and received was admissible to show that the enjoyment was not of right nor continuous and uninterrupted, for "every time the occupiers asked for leave they admitted that the former license had expired, and that the continuance of the enjoyment was broken." In neither of these cases was the effect of verbal remonstrances or complaints, as evidence of an interruption of enjoyment, considered.

Nor do the additional English cases cited by plaintiff's counsel in his brief meet the point under consideration. In *Livett v. Wilson*, 3 Bing. 115, it is stated in the report that "as to undisputed use of the way there was conflicting testimony, but the weight of the evidence showed that the alleged right had been pretty constantly contested,

and the defendant, upon recently taking some adjoining premises, the approach to which by the entrance he claimed into the yard, said "my right of way from the street to the yard can *now* no longer be resisted." The character of the acts of resistance does not appear in the report of the case, either in 3 Bing. or in 10 Moore — whether they were verbal complaints or physical resistance. I do not find in either report of the case any warrant for the assertion of Tucker, P. (*Nichols v. Aylor*, 7 Leigh, 565), that "repeated complaints and denials of the title of his adversary were considered as sufficiently rebutting the presumption of a grant." The only pertinency this case has to the subject now considered, arises from the manner in which the case was left to the jury. The judge left to the jury to find whether or not the right had been granted by deed, instead of submitting to them the questions of fact upon which the law presumes a grant. I agree that, if the issue upon such a claim of right is whether a deed in fact has been made, proof of verbal complaints on or off the *locus in quo*, as well as proof that no deed in fact was made during the continuance of the user, would be admissible and competent evidence; and such evidence would generally determine the issue. But this method of leaving the question to juries has been condemned by the English courts, and is at variance with the doctrine generally received by the courts of this country.

In *Olney v. Gardner*, 4 M. & W. 495, the decision was that, where there was unity of possession of the dominant and servient tenements, the time during which such possession was continued must not only be excluded in the computation of the twenty years, but destroyed altogether the effect of the previous possession by breaking the continuity of enjoyment. In *Bright v. Walker*, 1 C. M. & R. 211, it was held that, as against the reversioner, the enjoyment of an easement during a tenancy for life was not to be reckoned as part of the prescriptive period.

Eaton v. Swansea Water Works, 17 Q. B. 267, was an action for disturbance of a watercourse claimed by adverse user. The court held that interruptions, though not acquiesced in for a year under Statute 2 and 3 William IV., might show that the enjoyment was never of right, but was contentious throughout; and there being evidence that the owner of the servient tenement was in the habit of stopping up the trench whenever it was made, the neglect of the judge to answer a question propounded by a juror as to what would be the effect in law of a state of perpetual warfare between the parties was not a satisfactory method of leaving the case to the jury. In *Tickle v. Brown*, 4 A. & E. 369, it was held that the words "enjoyed by any person claiming a right," and "enjoyment thereof as of right," in the Statute, meant an enjoyment had not secretly, or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion or on many, and that, therefore, proof of a parol license was competent to show that the enjoyment was permissive, and not under a claim of right. The other two English cases referred to, *Benneson v. Cartright*, 5 B.

& S. 1; *Glover v. Coleman*, L. R. 10 C. P. 108, were simply interpretations of section 4 of the Statute 2 and 3 William IV., and are not authorities with respect to the principles upon which prescriptive rights are acquired or prevented at common law. In each of the cases there was an actual physical obstruction of the user, and these cases turned upon the meaning of the words "submitted to or acquiesced in," contained in section 4, which provided that no act or matter should be deemed an interruption unless it should have been submitted to or acquiesced in for one year. Mr. Goddard, writing after all these cases were decided, in his excellent treatise, says: "It is commonly said that no easement can be acquired by prescription if the user has been enjoyed *vi, clam aut precario*. The word *vi* does not simply mean by violence or force, but it means also by strife or contention of any kind — as, for instance, that the enjoyment has been during a period of litigation about the right claimed, or that the user has been continually disputed and interrupted by physical obstacles placed with a view of rendering the user impracticable." Goddard on Eas. 172.

I have not discovered in the English cases any intimation that mere denials of the right, complaints, remonstrances, or prohibitions of user, will be considered interruptions of the user of an easement, or as indicating that the enjoyment of it was contentious. On the contrary, whenever the subject has been mentioned, it has elicited expressions of marked disapprobation of such a proposition. This is conspicuously apparent in the opinions of Bayley, J., in *Cross v. Lewis*, 2 B. & C. 689; of Lush, J., in *Angus v. Dalton*, 3 Q. B. D. 85; and of Thesiger and Cotton, Lords Justices, in the same case, as reported in 4 Q. B. D. 172, 186. Thesiger, L. J., in considering the nature of the evidence which shall contradict, explain, or rebut the presumption of right arising from an uninterrupted possession of twenty years, says that it is "not sufficient to prove such circumstances as negative an actual assent on the part of the servient owner, or even evidence of dissent short of actual interruption or obstruction to the enjoyment." In *Angus v. Dalton*, the easement was not such as came within the Statute 2 and 3 William IV.; and the case was discussed and decided upon the principles of the common law, independently of the statutory provision.

Some confusion on the subject has arisen from the failure to discriminate between negative and affirmative easements; negative easements, such as easements of light, and of the lateral support of buildings, which cannot lawfully be interrupted except by acts done upon the servient tenement; and affirmative easements, such as ways and the overflowing of lands by water, which are direct interferences with the enjoyment by the servient owner of the premises, and may be the subject of legal proceedings as well as of physical interruption. This distinction is pointed out by the court in *Sturges v. Bridgman*, 11 Ch. D. 852. In *Angus v. Dalton*, the Queen's Bench decided that the negative easement of lateral support of buildings could not be acquired

by prescription, for the reason that the owner of the adjoining premises had no power to oppose the erection of the building and no reasonable means of resisting or preventing the enjoyment of its lateral support from his adjoining lands. But this decision was overruled in the Court of Appeals. *Angus v. Dalton*, 3 Q. B. D. 85; 4 Id. 162. With respect to such an easement there is great force of reasoning in the contention that slight acts of dissent should avail to defeat the acquisition of a right; for it would be unreasonable to compel the owner of the adjoining lands to dig down and undermine the foundations or to put him to legal proceedings *quia timet* to preserve dominion over his property. But no such considerations of hardship or inconvenience exist when the easement is a right of way, which, whenever the right is exercised, is a palpable invasion of property and may easily be obstructed, or is an easement of flooding lands, which is really, though not technically, a disseisin *pro tanto*, and can easily be interrupted.

The whole doctrine of prescription is founded on public policy. It is a matter of public interest that title to property should not long remain uncertain and in dispute. The doctrine of prescription conduces, in that respect, to the interest of society, and at the same time is promotive of private justice by putting an end to and fixing a limit to contention and strife. Protests and mere denials of right are evidence that the right is in dispute, as distinguished from a contested right. If such protests and denials, unaccompanied by an act which in law amounts to a disturbance and is actionable as such, be permitted to put the right in abeyance, the policy of the law will be defeated, and prescriptive rights be placed upon the most unstable of foundations. Suppose an easement is enjoyed, say, for thirty years. If after such continuance of enjoyment the right may be overthrown by proof of protests and mere denials of the right, uttered at some remote but serviceable time during that period, it is manifest that a right held by so uncertain a tenure will be of little value. If the easement has been interrupted by any act which places the owner of it in a position to sue and settle his right, if he chooses to postpone its vindication until witnesses are dead or the facts have faded from recollection, he has his own folly and supineness to which to lay the blame. But if by mere protests and denials by his adversary, his right might be defeated, he would be placed at an unconscionable disadvantage. He could neither sue and establish his right, nor could he have the advantage usually derived from long enjoyment in quieting titles.

Protests and remonstrances by the owner of the servient tenement against the use of the easement, rather add to the strength of the claim of a prescriptive right; for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, hostile and adverse; and if they be not accompanied by acts amounting to a disturbance of the right in a legal sense, they are no interruptions or obstructions of the enjoyment.

The instructions of the judge were erroneous in this respect. The jury should have been told that a continuous enjoyment under a claim of right for twenty years, not obstructed by some suable act, and having the other qualities of an adverse user, confers an indefeasible right. It is said that the instruction was given in view of evidence tending to show interruptions in fact of the right, and therefore the error was harmless. As the judgment will be reversed on other grounds, and the case may be retried, we prefer not to discuss the evidence at this time.

On the two exceptions considered here, we think the judgment should be reversed.

Exception was also taken to the charge of the judge refusing to exclude from the damages such as accrued during the term for which the plaintiff's premises were demised to other persons. The lease is dated June 2d, 1875. On the theory on which the plaintiff is entitled to an action for his injury, if the taking of his water-rights was before the lease was made, the subsequent demise was totally immaterial. In 1875, when the dam to its present height was made permanent, if not before, there was indisputably a taking *pro tanto*. How early in 1875 this was effected does not distinctly appear. If, on a retrial, it shall appear that the taking was after the rights of the tenant accrued, so much of the damages as represent the tenant's injury can be excluded.

The other exceptions have been examined. It is sufficient to say that we find them without any legal support.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, DEPUE, DIXON, KNAPP, PARKER, REED, SCUDDER, COLE—9.¹

CARMODY v. MULROONEY.

SUPREME COURT OF WISCONSIN. 1894.

[Reported 87 Wis. 552.]

APPEAL from the Circuit Court for Grant County.

The action was brought to establish an easement of right of way in the plaintiff over the defendant's lands. The plaintiff claimed a right of way over the defendant's lands by adverse user for more than twenty years. The defendant admitted the user, but denied that it was adverse. There is no conflict in the evidence on the question. The defendant and his grantor for more than twenty years maintained a private way from the residence upon the premises out to the highway, upon their own lands. The plaintiff and the defendant's grantor are

¹ See *accord*, *Oleson v. Patterson*, 29 Pa. 22 (1857); *Connor v. Sullivan*, 40 Conn. 26 (1873); *Jordan v. Lang*, 22 So. Car. 159 (1884); *Demuth v. Amareg*, 90 Pa. 181 (1879). *Contra*, *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339 (1878).

relatives, — brothers-in-law. Their lands adjoined. The plaintiff used the same way out to the highway for more than twenty years. Both worked upon the construction and repair of the way. The line of way was changed, in places, several times. Nothing was ever said by either to the other as to the right of the plaintiff to use the way. There was neither express permission nor express claim of right. There was a finding and judgment for the plaintiff, from which the defendant appeals.

John D. Wilson, for the appellant.

T. L. Cleary, for the respondent.

NEWMAN, J. One may acquire an easement of right of way over the lands of another by adverse user for a period of twenty years. To have this result, such user must be adverse to the owner of the land, under claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the estate over which the easement is claimed. Washb. Easem. (4th ed.), 150, par. 26. Such a right can never grow out of a mere tolerated or permissive use. Id. 152. Such adverse user, when continued for twenty years, constitutes a perfect title, as conclusive as a deed or grant. Godd. Easem. (Bennett's ed.), 136. The burden of proving the user to have been adverse is upon the party claiming the easement. Washb. Easem. 150, par. 36a; 2 Greenl. Ev. § 539; *American Co. v. Bradford*, 27 Cal. 360-367. Whether the use has been adverse is a question for the jury, or for the court when the trial is by the court. 19 Am. & Eng. Ency. of Law, note on page 14, and cases there cited. When it is shown that there has been the use of an easement for twenty years, unexplained, it will be presumed to have been under a claim of right and adverse, and will be sufficient to establish a right by prescription, and to authorize the presumption of a grant, unless contradicted or explained. In such a case the owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with the claim of right by the other party. Washb. Easem. 156, par. 31, and cases cited in note 5; *Garrett v. Jackson*, 20 Pa. St. 331. The finding and judgment of the circuit court are supported by this presumption, and so are in accord with the weight of evidence.

By the Court. — The judgment of the circuit court is affirmed.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD
CO. v. IVES.

SUPREME COURT OF ILLINOIS. 1903.

[Reported 202 Ill. 69.]

APPEAL from the Circuit Court of Mercer county; the Hon. FRANK D. RAMSAY, Judge, presiding.

Williams, Lawrence & Welsh, (*Chester M. Dawes*, of counsel,) for appellant.

Bassett & Bassett, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

This was a bill filed by the appellees in the circuit court of Mercer county to enjoin appellant from closing the openings under two bridges, known as 45C and 45D, on the Keithsburg branch of its railroad, and for a decree establishing in the appellees a perpetual easement for the passage of their live stock across the right of way of the appellant beneath said bridges. The issues having been made up, the case was referred to the master to take proofs and report his conclusions. A report was filed by him recommending that a decree be entered in accordance with the prayer of the bill, which was approved, and, the action as to bridge 45D having been abandoned, a decree was entered granting the relief prayed for in the bill as to bridge 45C, and the record has been brought to this court for review, by appeal.

It appears from the proof that the railroad of appellant severs the 390-acre farm of appellees in such manner as to leave upon the south side of the right of way about 70 acres; that the railroad was constructed in 1869, and in 1879 Gideon Ives, the ancestor of the appellees, conveyed to the appellant a strip of land one hundred feet in width across the said farm for right of way purposes, making no reservations in the deed, or otherwise. At the location of bridge 45C a ravine of considerable size crosses the right of way, and a pile bridge twenty feet high and seventy feet long was erected at that point. It has been repaired and rebuilt, and at one time shortened sixteen feet, by the appellant. The railroad was enclosed by fences parallel with the lines of the right of way to the abutments of the bridge, and then at right angles up to the abutments, thus leaving an opening underneath the bridge, through which debris carried down by heavy rains could pass unobstructed across the right of way. The land upon the south of the right of way was without water for stock, and for more than twenty-five years Ives, and since his death the appellees, have used the opening beneath the bridge as a passageway for horses and cattle to and from the parts of the farm located upon the north and south sides of the right of way. A beaten track was made and was plainly visible beneath the bridge. Soon after the railroad was fenced,

Ives built a fence upon his own land on the north side of the right of way at the opening, connected the ends thereof with appellant's fence, and put in a gate, which was under his control. Shortly prior to the filing of the bill appellant was preparing to place a large pipe in the opening and to fill up the ravine at bridge 45C, the effect of which would be to prevent live stock crossing appellant's right of way at that point.

No agreement or understanding of any kind was alleged or proved between Ives or his heirs and appellant, and the right of appellees, if any, arises by prescription. In order that a way may be established by prescription the use and enjoyment thereof must have been adverse, under a claim of right, exclusive, uninterrupted, and with the knowledge and acquiescence of the owner of the land in or over which the easement is claimed, for the period of twenty years. *Rose v. City of Farmington*, 196 Ill. 226. A mere permissive use never ripens into a prescriptive right. Washburn on Easements, p. 132. It must appear the use was enjoyed under such circumstances as to indicate that it was claimed as a right, and was not regarded by the parties as a mere privilege or license, revocable at the pleasure of the owner of the soil. *Dexter v. Tree*, 117 Ill. 532. The use of a way without objection or hindrance is not inconsistent with use by permission. *Smith v. City of Sedalia*, 152 Mo. 283; 48 L. R. A. 711. The appellant had the right to construct a pile bridge over the ravine spanned by bridge 45C, and by so doing it did not convert the opening beneath it into a farm crossing, or confer the right upon Ives or his heirs or grantees to use it as a passageway for horses and cattle. There is no evidence of any adverse use or claim of right by the appellees in the opening. The use, therefore, was permissive only, and amounted to no more than a license, revocable at the pleasure of the appellant. *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Munsell*, 192 Ill. 430. The ravine was crossed by the railroad of appellant in the usual way at the time it bridged the same, and the fact that Ives and his heirs used the opening without objection on the part of the appellant did not bar it of the right to change such construction and fill up the ravine when, in the judgment of its officers, the character of its trains and its increased business required that the pile bridge be eliminated from its road-bed. To create in appellees an easement by prescription in the passageway, in addition to a continuous and uninterrupted use and enjoyment thereof for twenty years with the acquiescence of the owner, it was necessary that it appear that such use and enjoyment were adverse to the owner and under claim of right. 19 Am. & Eng. Ency. of Law, pp. 9-11; *Chicago and Northwestern Railway Co. v. Hoag*, 90 Ill. 339; *Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Munsell*, *supra*. This the evidence failed to establish.

We are of the opinion a grant of the opening as a passageway cannot be presumed from the evidence found in this record.

The decree of the circuit court will be reversed and the cause re-

manded to that court, with directions to dismiss the bill for want of equity.
Reversed and remanded, with directions.

NOTE.—As to the extent of the right acquired by prescription where the user has been under color of title, see *Hoag v. Place*, 98 Mich. 450, 459 (1892). As to whether actual knowledge by the owner of the servient tenement is necessary, see *Ward v. Warren*, 82 N. Y. 265 (1890); *Ludlow Co. v. Indian Orchard Co.*, 177 Mass. 61 (1900). As to exclusive user, see *Reid v. Garnett*, 101 Va. 47 (1903).

NOTE.—**INVOLUNTARY TRANSFER.** Besides the modes of voluntary transfer dealt with in the following chapters, the rights of persons in real property are sometimes transferred from them against or without their will.

FORFEITURE. Forfeiture may be to the Crown or to the State for crime; or it may be to the grantor of an estate for breach of condition, or for waste. On forfeiture for crime, see 4 Bl. Com. 381-388; cf. Stimson, Am. Stat. Law, § 1162. On forfeiture for waste, see 1 Gray, Cas. on Prop. (2d ed.) Book IV. c. 7, p. 629. Forfeiture for breach of implied conditions by wrongful alienation is best considered with Tortious Conveyances; and forfeiture for breach of express conditions will be dealt with in connection with conditional estates. On forfeiture for alienation in mortmain, see 2 Bl. Com. 268-273.

EXEMPTION. Land could not be taken on execution until St. 13 Edw. 1 (Westm. II. 1285), c. 18, which enacted "that when debt is recovered or knowledge in the King's Court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ of *Fieri facias* unto the sheriff for to levy the debt of the lands and goods; (2) or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) and the one half of his land, until the debt be levied upon a reasonable price or extent; (3) and if he be put out of that tenement, he shall recover by a writ of Novel Disseisin, and after by writ of Redisseisin, if need be." As to the writ of *Elegit*, thus created, and extents on statutes merchant, statutes staple, and obligations to the king, see 3 Bl. Com. 418-421, and Chitty's notes.

BANKRUPTCY. All bankrupt and insolvent Acts now contain provisions for transferring to the assignee all the land belonging to the bankrupt or insolvent.

MARRIAGE. The transfer of property on marriage will be dealt with later.

LIENS, which bind lands and prevent their alienation until they can be sold on execution, are often created under Statutes, by attachment or judgment. Cf. also the mechanics' liens which have been introduced generally in the United States.

CHAPTER III.

THE FORM OF CONVEYANCES.

NORM. — On Seisin and Conveyance, see 1 Gray, *Cas. on Prop.* (2d ed.) Bk. III. c. 8, p. 848.

The modes of conveying Real Property at common law are: (1) By Livery of Seisin; (2) By Deed; (3) By Parol, or by Parol and Entry; (4) By Record; (5) By Special Custom. The first three are dealt with in Vol. I. Bk. III. c. 8, above referred to, and in the present chapter.

CONVEYANCES BY RECORD.

A. FINES AND RECOVERIES are very ancient collusive suits brought by the person to whom the land is to be conveyed against the person who is to convey it, and resulting in an acknowledgment that the land is the property of the complainant or demandant.

The clearest account of their mode of operation will be found in 2 Bl. Com. 848-864. They are dealt with more in detail in Smith's *Real and Personal Property* (5th ed.), 955-1055. Cf. also Challis, *Real Prop.* c. 27. The forms of fines and recoveries are given in the appendix to 2 Bl. Com.

Although fines and recoveries were most commonly used to bar estates tail, they were by no means confined to this. A fine, for instance, was the means ordinarily employed to pass a married woman's interest.

I. (1) A tenant in fee simple in possession could convey by *fine* or *recovery*. Although the seisin was tortious, yet under the St. 4 Hen. VII. (1489) c. 24, after a *fine* with *proclamations* had been levied, the claims of all persons, not under disability, were barred at the end of five years after the fine, or, if their claims arose after the fine, then five years from the time they arose. This was in effect substituting a period of five years only for the time required by the Statute of Limitations. This result was not worked by a *fine* without *proclamations* nor by a *recovery*. (2) A *fine* by one seised in remainder in fee passed his interest; so although a *recovery* could not properly be suffered unless there was a tenant to the *præcipe*, that is, some one seised of an estate of freehold in possession, who would join in the recovery, yet if a recovery was suffered by a tenant in fee in remainder, without a proper tenant to the *præcipe*, he was bound by estoppel. A *fine* with *proclamations* under the St. Hen. VII., levied by one seised in fee in remainder or reversion, would, after five years, bar all interests (except the preceding estate which supported the remainder), although the particular estates and the remainders or reversion had been created by a tortious conveyance. Co. Lit. 398 a.

II. The Statute *De Donis*, 18 Edw. I. (1285) c. 1, which is given in the 1st vol. of the Cases, p. 385, provided that an estate tail could not be barred by a fine. By *Taltarum's Case*, Y. B. 12 Edw. IV. 19 (1473), the validity of a common recovery to bar an estate tail was recognized. (1) By Sts. 4 Hen. VII. c. 24 (1489), and 32 Hen. VIII. c. 36 (1540), a tenant in tail in possession by a *fine* levied with *proclamations* barred the heirs in tail of the tenant immediately, and, in five years after their respective rights accrued, all remaindermen and reversioners and other persons except the Crown. A *recovery*, properly suffered, barred immediately all persons except the Crown. (2) A tenant in tail in remainder could under the Statutes above cited, by a *fine* with *proclamations* and non-claim, bar the heirs in tail and outside persons, but not subsequent remaindermen or the reversioner. A tenant in tail in remainder could, by a *recovery*, bar the subsequent estates, provided the immediate tenant of

the freehold would join in the recovery; but if he did not join, then, for want of a good tenant to the *præcipe*, the recovery barred neither the issue in tail nor the remaindermen, nor reversioner. This was partially altered by St. 14 Geo. II. c. 20, § 1 (1740).

III. (1) A *fine* or recovery by a tenant for life in possession worked a forfeiture of his estate, and was no bar to vested estates in remainder or to the reversion, but it destroyed contingent remainders. *Doe d. Davies v. Gatacre*, 5 Bing. N. C. 609 (1839). Under the Statute 4 Hen. VII. c. 24, however, a *fine* by tenant for life with proclamations and five years' non-claim barred all persons. (2) A *fine* or recovery by a tenant for life in remainder had no effect except to pass his interest; a *fine* by him with proclamations under the Statute did not bar any subsequent estates in remainder or reversion, but did probably bar, after the period of non-claim, all outside claims.

IV. If a *fine* was levied, with or without proclamations, or a recovery suffered by a tenant for years, he forfeited his estate, but no bar was created. If a tenant for years made a tortious feoffment in fee, and the feoffee levied a *fine* with proclamations, then after the period of non-claim he got a good title.

V. If one who had no estate in the land, levied a *fine* or suffered a recovery, it had no effect on third persons, but he was himself estopped, if he afterwards became entitled to the land.

The effect of a *fine* with proclamations under the Statute of 4 Hen. VII. and non-claim, was to pass the title, and not merely to bar the remedy. A *fine* of an incorporeal hereditament levied by a life tenant, passed no more than the cognizor's interest; yet such *fine* was a forfeiture, as it was in case of a corporeal hereditament.

The *fine* spoken of in this note is the ordinary *fine sur cognisance de droit, come cee que il ad de son done*; the *finer sur cognisance de droit tantum* and *sur concessit* had more limited effects.

By the St. 3 & 4 Wm. IV. c. 74, § 2 (1833), *finer* and recoveries were abolished.

Finer and recoveries are generally done away with in the United States.

B. PUBLIC GRANTS. These are sometimes made by Act of the Legislature, sometimes by the Crown, or other executive power.

See 2 Bl. Com. 344-348; 3 Wash. R. P., book iii. c. 3, § 1.

CONVEYANCE BY SPECIAL CUSTOM.

On the mode of alienating copyholds, see 1 Gray, Cas. on Prop. (2d ed.) p. 364; 2 Bl. Com. 365.

The peculiar tenure known as tenant right is copyhold, although title is passed by deed and admittance, instead of surrender and admittance. See Scriven, Copyholds (6th ed.), 14-17. But see *Bingham v. Woodgate*, 1 Russ. & Myl. 32 (1829).

Limitations of copyholds are construed in the same manner as limitations of freeholds and the Rule in *Shelley's Case* applies to copyholds. Scriv. 96, 96.

The Statute *De Donis* did not apply to copyholds; and therefore if, in a manor, a copyhold can be entailed (as is sometimes the case), it must be by virtue of a special custom; but where there is no custom to entail, a grant of copyhold land to A. and the heirs of his body will generally give him a fee simple conditional. Where an entail of a copyhold cannot be barred by the custom in any other way, it is barred by a surrender. Scriv. 40-46. A copyholder may lease land for a year, by the general custom of the realm, without his lord's license. Scriv. 192. Admittance is compelled by *mandamus* or bill in equity. Scriv. 365-368, 376.

SECTION I.

CONVEYANCE TO STRANGERS.

NOTE.—At Common Law estates of freehold in land could be created by livery of seisin. Estates of less than freehold could be created by parol agreement and entry. Present estates of freehold could be transferred by livery of seisin. Present estates of less than freehold could be transferred by parol agreement and entry. Reversions and vested remainders could be transferred by deed. See 1 Gray, Cas. on Prop. (2d ed.) 341, 342, 348-355, 357-368.

Conveyances by livery of seisin might have a tortious operation; conveyances by deed or parol and entry were innocent. Some sections from Littleton are given below to bring out more clearly the distinction between tortious and innocent conveyances.

Rights in land, such as easements and profits, could be created and transferred by deed, but not by parol, even though they were for years only. 2 Bl. Com. 317; *Somerset v. Fogge*, 5 B. & C. 875 (1826); *Bird v. Higginson*, 2 A. & E. 696 (1836).

The Statute of Uses, 27 Hen. VIII. c. 10 (1536), made possible new methods of conveyancing. A use, both before and after the Statute, could be raised by an agreement for a pecuniary consideration, called a bargain and sale, or by a covenant for a consideration of blood or marriage, called a covenant to stand seised. The use, or equitable interest, so raised was, by operation of the Statute, converted into a corresponding legal estate. See 1 Gray, Cas. on Prop. (2d ed.) 368-416.

The Statute of Enrolments, 27 Hen. VIII. c. 16 (1536), required that all bargains and sales of estates of freehold should be enrolled. This Statute has not been adopted as part of the law of this country. It is given in 1 Gray, Cas. on Prop. (2d ed.) 382.

The requirements of the Statute of Frauds, 29 Car. II. c. 3, §§ 1-3 (1677), are given in full below.

It was held in *Jackson d. Gouch v. Wood*, 12 Johns. 73 (N. Y. 1815), that a bargain and sale of a freehold estate must be under seal. *Sed qu.* The same result has been reached by statute in a number of states. As to statutory provisions regarding the use of seals, see Stimson, Am. St. Law, § 1564.

LIT. § 609. For if I let land to a man for term of his life, &c., and the tenant for life letteth the same land to another for term of years, &c., and after my tenant for life grant the reversion to another in fee, and the tenant for years attorn, in this case the grantee hath in the freehold but an estate for term of the life of his grantor, &c., and I which am in the reversion of the fee simple may not enter by force of this grant of the reversion made by my tenant for life, for that by such grant my reversion is not discontinued, but always remains unto me, as it was before, notwithstanding such grant of the reversion made to the grantee, to him and to his heirs, &c., because nothing passed by force of such grant, but the estate which the grantor hath, &c.

LIT. § 610. In the same manner is it, if tenant for term of life by his deed confirm the estate of his lessee for years, to have and to hold to him and his heirs, or release to his lessee and his heirs, yet the lessee for years hath an estate but for term of the life of the tenant for life, &c.

LIT. § 611. But otherwise it is when tenant for life maketh a feoffment in fee, for by such a feoffment the fee simple passeth. For tenant

for years may make a feoffment in fee, and by his feoffment the fee simple shall pass, and yet he had at the time of the feoffment made but an estate for term of years, &c.

LIT. § 613. Also, if tenant in tail by his deed grant to another all his estate which he hath in the tenements to him entailed, to have and to hold all his estate to the other, and to his heirs forever, and deliver to him seisin accordingly; in this case the tenant to whom the alienation was made hath no other estate but for term of the life of tenant in tail. And so it may be well proved that tenant in tail cannot grant nor alien, nor make any rightful estate of freehold to another person, but for term of his own life only, &c.

LIT. § 615. Also, if land be let to a man for term of his life, the remainder to another in tail, if he in the remainder will grant his remainder to another in fee by his deed, and the tenant for life attorn, this is no discontinuance of the remainder.

LIT. § 617. Also, if a man be tenant in tail of an advowson in gross, or of a common in gross, if he by his deed will grant the advowson or common to another in fee, this is no discontinuance; for in such cases the grantees have no estate but for term of the life of tenant in tail that made the grant, &c.

LIT. § 618. And note, that of such things as pass by way of grant, by deed made in the country, and without livery, there such grant maketh no discontinuance, as in the cases aforesaid, and in other like cases, &c. And albeit such things be granted in fee, by fine levied in the king's court, &c., yet this maketh not a discontinuance, &c.

LIT. § 619. [Note, if I give land to another in tail, and he letteth the same land to another for term of years, and after the lessor granteth the reversion to another in fee, and the tenant for years attorn to the grantee, and the term expireth during the life of the tenant in tail, by which the grantee enter, and after the tenant in tail hath issue and die; in this case this is no discontinuance, notwithstanding the grant be executed in the life of the tenant in tail, for that at the time of the lease made for years, no new fee simple was reserved in the lessor, but the reversion remained to him in tail, as it was before the lease made.]¹

LIT. § 620. But if the tenant in tail make a lease for term of the life of the lessee, &c., in this case the tenant in tail hath made a new reversion of the fee simple in him; because when he made the lease for life, &c., he discontinued the tail, &c., by force of the same lease, and also he discontinued my reversion, &c. And it behooveth that the reversion of the fee simple be in some person in such case: and it cannot be in me which am the donor, inasmuch as my reversion is discontinued; *ergo*, the reversion of the fee ought to be in the tenant in tail, who discontinued my reversion by lease, &c. And if in this case the tenant in tail grant by his deed this reversion in fee to another, and the tenant for life attorn, &c., and after the tenant for

¹ Lord Coke says this is not in the original, but yet is good law.

life dieth, living the tenant in tail, and the grantee of the reversion enter, &c., in the life of the tenant in tail, then this is a discontinuance in fee; and if after the tenant in tail dieth, his issue may not enter, but is put to his writ of *formedon*. And the cause is, for that he which hath the grant of such reversion in fee simple, hath the seisin and execution of the same lands or tenements, to have to him and to his heirs in his demesne as of fee, in the life of the tenant in tail.

And this is by force of the grant of the said tenant in tail.

Lrr. § 622. But in this case, if tenant in tail that grants the reversion, &c., dieth, living the tenant for life, and after the tenant for life dieth, and after he to whom the reversion was granted enter, &c., then this is no discontinuance, but that the issue of the tenant in tail may well enter upon the grantee of the reversion; because the reversion which the grantee had, &c., was not executed, &c., in the life of the tenant in tail, &c. And so there is a great diversity when tenant in tail maketh a lease for years, and where he maketh a lease for life; for in the one case he hath a reversion in tail, and in the other case he hath a reversion in fee.

Lrr. § 623. For if land be given to a man and to his heirs males of his body engendered, who hath issue two sons, and the eldest son hath issue a daughter and dieth, and the tenant in tail maketh a lease for years and die, now the reversion descendeth to the younger son, for that the reversion was but in the tail, and the youngest son is heir male, &c. But if the tenant had made a lease for life, &c., and after died, now the reversion descendeth to the daughter of the elder brother, for that the reversion is in the fee simple, and the daughter is heir general, &c.

Lrr. § 631. But where the tenant in tail maketh a lease for years or for life, the remainder to another in fee, and delivereth livery of seisin accordingly, this is a discontinuance in fee, for that the fee simple passeth by force of the livery of seisin, &c.

29 CAR. II. c. 3, §§ 1-3. For prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury; (2) be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, That from and after the four and twentieth day of June, which shall be in the year of our Lord one thousand six hundred seventy and seven, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any con-

sideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding.

II. Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised.

III. And moreover, That no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall at any time after the said four and twentieth day of June be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

SECTION II.

RELEASES.

LIT. § 444. Releases are in divers manners, viz. releases of all the right which a man hath in lands or tenements, and releases of actions personals and reals, and other things. Releases of all the right which men have in lands and tenements, &c., are commonly made in this form, or of this effect:—

LIT. § 445. Know all men by these presents, that I, A. of B., have remised, released, and altogether from me and my heirs quitclaimed (*me A. de B. remisisse, relaxasse, et omnino de me et hæredibus meis quietum clamasse*): or thus, for me and my heirs quitclaimed to C. of D. all the right, title, and claim (*totum jus, titulum, et clamorem*) which I have, or by any means may have, of and in one messuage with the appurtenances in F., &c. And it is to be understood, that these words, *remisisse et quietum clamasse*, are of the same effect as these words, *relaxasse*.

LIT. § 447. Also, in releases of all the right which a man hath in certain lands, &c., it behooveth him to whom the release is made in any case, that he hath the freehold in the lands in deed, or in law, at the time of the release made, &c. For in every case where he to whom the release is made hath the freehold in deed, or in law, at the time of the release, &c., there the release is good.

LIT. § 449. Also, in some cases of releases of all the right, albeit that he to whom the release is made hath nothing in the freehold in deed nor in law, yet the release is good enough. As if the disseisor letteth the land which he hath by disseisin to another for term of his life, saving the reversion to him, if the disseisee or his heir release to

the disseisor all the right, &c., this release is good, because he to whom the release is made, had in law a reversion at the time of the release made.

Lrr. § 450. In the same manner it is, where a lease is made to a man for term of life, the remainder to another for term of another man's life, the remainder to the third in tail, the remainder to the fourth in fee, if a stranger which hath right to the land releaseth all his right to any of them in the remainder, such release is good, because every of them hath a remainder in deed vested in him.

Lrr. § 451. But if the tenant for term of life be disseised, and afterwards he that hath right (the possession being in the disseisor) releaseth to one of them to whom the remainder was made all his right, this release is void, because he had not a remainder in deed at the time of the release made, but only a right of a remainder.

Lrr. § 459. Also, if a man letteth to another his land for term of years, if the lessor release to the lessee all his right, &c., before that the lessee had entered into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heir, is sufficient to him by reason of the privity which by force of the lease is between them, &c.

Lrr. § 460. In the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will, by force of which lease the lessee hath possession: if the lessor in this case make a release to the lessee of all his right, &c., this release is good enough for the privity which is between them; for it shall be in vain to make an estate by a livery of seisin to another, where he hath possession of the same land by the lease of the same man before, &c.

But the contrary is holden, Pasch. 2 E. 4, by all the justices.¹

Lrr. § 461. But where a man of his own head occupieth lands or tenements at the will of him which hath the freehold, and such occupier claimeth nothing but at will, &c., if he which hath the freehold will release all his right to the occupier, &c., this release is void, because there is no privity between them by the lease made to the occupier, nor by other manner, &c.

Lrr. § 465. Also, releases according to the matter in fact, sometimes have their effect by force to enlarge the state of him to whom the

¹ "By these two sections is to be observed a diversity between a tenant at will, and a tenant at sufferance; for a release to a tenant at will is good, because between them there is a possession with a privity; but a release to a tenant at sufferance is void, because he hath a possession without privity. As if lessee for years hold over his term, &c., a release to him is void, for that there is no privity between them; and so are the books that speak of this matter to be understood.

"'But the contrary is holden,' &c. This is of a new addition, and the book here cited ill understood, for it is to be understood of a tenant at sufferance." Co. Lit. 370 b.

release is made. As if I let certain land to one for term of years, by force whereof he is in possession, and after I release to him all the right which I have in the land without putting more words in the deed, and deliver to him the deed, then hath he an estate but for term of his life. And the reason is, for that when the reversion or remainder is in a man who will by his release enlarge the estate of the tenant, &c., he shall have no greater estate, but in such manner and form as if such lessor were seised in fee, and by his deed will make an estate to one in a certain form, and deliver to him seisin by force of the same deed; if in such deed of feoffment there be not any word of inheritance, then he hath but an estate for life; and so it is in such releases made by those in the reversion or in the remainder. For if I let land to a man for term of his life, and after I release to him all my right without more saying in the release, his estate is not enlarged. But if I release to him and to his heirs, then he hath a fee simple; and if I release to him and to his heirs of his body begotten, then he hath a fee tail, &c. And so it behooveth to specify in the deed what estate he to whom the release is made shall have.

LIT. § 466. Also, sometimes releases shall inure *de mitter*, and vest the right of him which makes the release to him to whom the release is made. As if a man be disseised, and he releaseth to his disseisor all his right, in this case the disseisor hath his right, so as where before his state was wrongful, now by this release it is made lawful and right.

LIT. § 467. But here note, that when a man is seised in fee simple of any lands or tenements, and another will release to him all the right which he hath in the same tenements, he needeth not to speak of the heirs of him to whom the release is made, for that he hath a fee simple at the time of the release made. For if the release was made to him for a day, or an hour, this shall be as strong to him in law as if he had released to him and his heirs. For when his right was once gone from him by his release without any condition, &c., to him that hath the fee simple it is gone forever.

LIT. § 468. But where a man hath a reversion in fee simple, or a remainder in fee simple, at the time of the release made, there if he will release to the tenant for years, or for life, or to the tenant in tail, he ought to determine the estate which he to whom the release is made shall have by force of the same release, for that such release shall inure to enlarge the estate of him to whom the release is made.

LIT. § 469. But otherwise it is where a man hath but a right to the land, and hath nothing in the reversion nor in the remainder in deed. For if such a man release all his right to one which is tenant in the freehold, all his right is gone, albeit no mention be made of the heirs of him to whom the release is made. For if I let lands to one for term of his life, if I after release to him to enlarge his estate, it behooveth that I release to him and to his heirs of his body engendered, or to him and his heirs, or by these words, To have and to hold to him and to his heirs of his body engendered, or to the heirs male of

his body engendered, or such like estates, or otherwise he hath no greater estate than he had before.

Lrr. § 470. But if my tenant for life letteth the same land over to another for term of the life of his lessee, the remainder to another in fee, now if I release to him to whom my tenant made a lease for term of life, I shall be barred forever, albeit that no mention be made of his heirs, for that at the time of the release made I had no reversion, but only a right to have the reversion. For by such a release, and the remainder over, which my tenant made in this case, my reversion was discontinued, &c., and this release shall inure to him in the remainder, to have advantage of it, as well as to the tenant for term of life.

Lrr. § 471. For to this intent the tenant for term of life and he in the remainder are as one tenant in law, and are as if one tenant were sole seised in his demesne as of fee at the time of such release made unto him, &c.

Lrr. § 479. But releases which inure by way of extinguishment against all persons, are where he to whom the release is made cannot have that which to him is released. As if there be lord and tenant, and the lord release to the tenant all the right which he hath in the seignior, or all the right which he hath in the land, &c., this release goeth by way of extinguishment against all persons, because that the tenant cannot have service to receive of himself.

Lrr. § 480. In the same manner is it of a release made to the tenant of the land of a rent-charge or common of pasture, &c., because the tenant cannot have that which to him is released, &c., so such releases shall inure by way of extinguishment in all ways.¹

SECTION III.

SURRENDERS.

Co. Lrr. 337 b. "Surrender," *sursum redditio*, properly is a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them.

¹ A release inuring by way of *mitter l'estate* is "where two persons come in by the same feudal contract, as joint-tenants or coparceners, and one of them releases to the other the benefit of it. In releases which operate by this last mode, the releasee being supposed to be already seised of the inheritance by virtue of the former feudal contract, and the release only operating as a discharge from the right or pretension of another seised under the same contract, words of inheritance in the release are useless; but where the release operates by enlargement, the releasee having no such previous inheritance, and feefs being either for life or in fee, as they are originally granted, the release gives the estate to the releasee for his life only, unless it be expressly made to him and his heirs." Butler's note to Co. Lit. 273 b.

Co. LIT. 338 a. A surrender properly taken is of two sorts, viz. a surrender in deed, or by express words, (whereof Littleton here putteth an example,) and a surrender in law wrought by consequent by operation of law. Littleton here putteth his case of a surrender of an estate in possession, for a right cannot be surrendered. And it is to be noted, that a surrender in law is in some cases of greater force than a surrender in deed. As if a man make a lease for years to begin at Michaelmas next, this future interest cannot be surrendered, because there is no reversion wherein it may drown; but by a surrender in law it may be drowned. As if the lessee before Michaelmas take a new lease for years either to begin presently, or at Michaelmas, this is a surrender in law of the former lease. *Fortior et aequior est dispositio legis quam hominis.*

Also there is a surrender without deed, whereof Littleton putteth here an example of an estate for life of lands, which may be surrendered without deed, and without livery of seisin; because it is but a yielding, or a restoring of, the state again to him in the immediate reversion or remainder, which are always favored in law. And there is also a surrender by deed; and that is of things that lie in grant, whereof a particular estate cannot commence without deed, and by consequent the estate cannot be surrendered without deed. But in the example that Littleton here putteth, the estate might commence without deed, and therefore might be surrendered without deed. And albeit a particular estate be made of lands by deed, yet may it be surrendered without deed, in respect of the nature and quality of the thing demised, because the particular estate might have been made without deed; and so on the other side. If a man be tenant by the curtesy, or tenant in dower of an advowson, rent, or other thing that lies in grant; albeit there the estate begin without deed, yet in respect of the nature and quality of the thing that lies in grant it cannot be surrendered without deed. And so if a lease for life be made of lands, the remainder for life; albeit the remainder for life began without deed, yet because remainders and reversions, though they be of lands, are things that lie in grant, they cannot be surrendered without deed. See in my Reports plentiful matter of surrenders.

NOTE. — See St. 29 Car. II. c. 3, § 3 (1677), given at p. 196, *ante*.

WHITLEY v. GOUGH.

1557.

[Reported Dyer, 140 b.]

IN trespass between Whitley, widow, and Gough, there was a demurrer in law upon the evidence, where the husband of the plaintiff made a lease by indenture to the defendant for a term of ninety years,

and afterwards enfeoffed certain persons, and took back an estate to himself and his said wife in tail; and afterwards the termor took a new lease of the husband for eighteen years only, to commence immediately, by parol; and afterwards the husband died, and his wife ousted the termor. And by the opinion of the judges she may well do this, for the first lease was surrendered and merged in law by the acceptance of the second, &c. See E. 3 Eliz. fol. 200, pl. 62.¹

MAGENNIS v. MAC-CULLOGH

EXCHEQUER IN IRELAND.²

[Reported Gilb. Cas. in Eq. 285.]

RICHARD CLOSE being tenant for life, with remainder to his first and other sons in tail, with several remainders over to the brothers of Richard, the reversion to Richard in fee (*prout* the will). Richard makes a lease for years by indenture, to William Mac-Cullogh, and afterwards has the lease delivered up to him by William Mac-Cullogh; and then Richard tears off the seal by the consent of William; William continues in possession after the lease was cancelled as aforesaid; and some time after, Richard makes a lease to William, being in possession, of the same lands for three lives, with livery and seisin; after livery and seisin, Richard marries and has a son Richard, the lessor of the plaintiff.

Question 1. Whether the lease for years be surrendered by the cancelling the indenture as aforesaid.

Question 2. Whether the contingent remainders to the first and other sons of Richard the father, be destroyed by the lease for lives, made as aforesaid by Richard the father.

The above case, and points thereon, are referred to the Right Honorable the Lord Chief Baron GILBERT, for his judgment, at his chamber.

I am of opinion, that since the Statute of Frauds and Perjuries, a lease for years cannot be surrendered by cancelling of the indenture without writing; because the intent of that Statute was to take away the manner they formerly had, of transferring interests to lands, by signs, symbols, and words only; and therefore, as a livery and seisin on a parol feoffment was a sign of passing the freehold before the Statute, but is now taken away by the Statute; so I take it, that the cancelling of a lease was a sign of a surrender before the Statute, but

¹ If a lease is void its acceptance is not a surrender of a former lease. *Watt v. Maydewell*, Hutt. 104 (1628); *Davison v. Stanley*, 4 Burr. 2210 (1708); *Doe d. Egremont v. Courtenay*, 11 Q. B. 702 (1848); *Doe d. Biddulph v. Poole*, Id. 713 (1848). Cf. *Chamberlain v. Dunlop*, 126 N. Y. 45 (1891). If *Mellows v. May*, 2 Cro. El. 874 (1602), is correctly reported, it must be considered as overruled.

² The date is not given, but Sir Jeffrey Gilbert was Chief Baron of the Exchequer in Ireland from 1715 to 1722.

is now taken away, unless there be a writing under the hand of the party. And the words, viz., "By act and operation of law," are to be construed a surrender in law, by the taking a new lease; which being in writing, is of equal notoriety with a surrender in writing.

2dly. I am of opinion, that if the lease for years continued in being till the lease for lives was made, &c., as it seems by the case that it did, then that interest which passed from Richard Close to William MacCulloch, did not pass by livery and seisin, so as to work a discontinuance of the estate for life, but only by way of release to the tenant for years, and by way of enlarging of his estate; for it was a reversion depending on a lease for years, and passes by way of grant and attornment to a stranger, and by way of release to the tenant himself; and such grant and release transfers no more than the tenant for life might lawfully pass, viz., an estate during the life of the tenant for life; and consequently, the particular estate for life was in being when the contingent remainder came in *esse*; and therefore I think the plaintiff must have the *postea*. 19 H. 6, 33; Cro. Eliz. 487; Brook, Surrender 49, Tit. Dower 55, *Hugh Cholmly's Case*.¹

THOMAS v. COOK.

KING'S BENCH. 1818.

[*Reported 2 B. & Ald. 119.*]

ACTION for use and occupation. At the trial of this cause at the London sittings after Trinity Term before *Abbott, J.*, it appeared that the plaintiff had originally let the premises, consisting of a house in Long Lane, to the defendant as tenant from year to year. After he had resided there for some time, the defendant underlet them to one Perkes, commencing at Christmas 1816. At Lady-day 1817, defendant distrained Perkes's goods for rent in arrear. Rent being then due from the defendant to Thomas, the latter gave notice to Perkes not to pay the rent to the defendant, but to him; and upon Cook's refusing to take Perkes's bill for the amount then due, the plaintiff agreed to take it himself in payment of the rent due from Cook to him, saying that he would not have anything further to do with Cook. And afterwards, in October 1817, the plaintiff himself distrained the goods of Perkes for rent in arrear. The jury found, by the direction of the learned judge, a verdict for the defendant, on the ground that Thomas had, with the assent of Cook, accepted Perkes as his tenant of the premises. And now

Topping moved for a new trial.

ABBOTT, C. J. By the third section of the Statute of Frauds, it is enacted "that no leases, estates, or interests, either of freehold, terms

¹ See *Roe d. Berkeley v. Archbishop of York*, 6 East, 86 (1806); *Brewer v. National Union Building Association*, 166 Ill. 221 (1897). Cf. *Walker v. Richardson*, 2 M. & W. 882 (1837).

of years, or any other uncertain interest in any messuages, manors, lands, tenements, or hereditaments shall be surrendered, unless by deed or note in writing, or by act and operation of law." And the question in this case is, whether what has been done will amount to a surrender by act and operation of law. Now the facts of the case are these. The plaintiff Thomas had let the premises in question to the defendant as tenant from year to year, and the defendant underlet them to Perkes. The rent being in arrear, the defendant, on Lady-day 1817, distrained the goods of Perkes, who having tendered a bill in payment of the rent which the defendant had refused to receive, the plaintiff then interposed, took the bill in payment, and accepted Perkes as his tenant: and afterwards in October 1817, himself distrained the goods of Perkes for rent then in arrear. I left it to the jury to say whether under these circumstances the plaintiff had not, with the assent of Cook, accepted Perkes as his tenant of the premises, and the jury found that fact in the affirmative. I think, therefore, this amounted to a valid surrender of Cook's interest in the premises, being a surrender by act and operation of law. The consequence is that the plaintiff can have no claim for rent against the present defendant, and that the verdict therefore was right.

BAYLEY, J. If a lessee assigns over his interest, and the lessor accepts the assignee as his tenant, the privity of estate is thereby destroyed, and on that ground it is not competent for the lessor to bring debt against the lessee. Where, indeed, the contract is by deed, there he may bring covenant by the Statute of H. 8. In this case, the landlord has accepted Perkes as his tenant, and must be considered to have made his election between Perkes and Cook. And the case of *Phipps v. Sculthorpe*, 1 Barn. & Ald. 50, is an authority to show that the plaintiff has no right to recover. This was a surrender of Cook's interest in the premises by act and operation of law, and the jury were quite right in presuming that Cook had assented to the acceptance of Perkes as tenant to the plaintiff; for that assent was clearly for Cook's benefit.

HOLROYD, J. It appears from the Statute of Frauds that a surrender, in order to be valid, must be either by deed or note in writing, or by act and operation of law. In *Mollett v. Brayne*, 2 Campb. 103, there was only a parol surrender, and no circumstance existed in that case which could constitute a surrender by act and operation of law. But in this case, there is not merely a declaration by the plaintiff, that he will no longer consider Cook as his tenant, but there is also the acceptance by him of another person as the tenant, and that acceptance is assented to by Cook. Now, if a lease be granted to an individual, and there be a subsequent demise of the premises by parol to the same person, that will amount to a surrender of his lease. Then the circumstance of Cook having first put in another person as undertenant, and having afterwards assented to a second demise by the plaintiff to that person, will in the present case amount to a virtual surrender of his interest by act and operation of law. Notwithstanding therefore

the third section of the Statute of Frauds, I am of opinion, that the facts here found by the jury amount to a valid surrender of Cook's interest, and a re-demise of the premises by the plaintiff to Perkea. In that case there will be no ground for disturbing the present verdict.

*Rule refused.*¹

HAMERTON v. STEAD.

KING'S BENCH. 1824.

[Reported 3 B. & C. 478.]

TRESPASS for breaking and entering a mill, dwelling-house, and close of plaintiff, ejecting him therefrom, and keeping him out of possession for a long space of time. Plea, *liberum tenementum*. Replication, that before the said time when, &c., to wit, on, &c., defendant demised the premises to plaintiff, as tenant from year to year, by virtue of which demise plaintiff entered, and was possessed of the premises, and continued so possessed until and at the said time when, &c. Rejoinder, that after the making of the said demise in the replication mentioned, and before the said time when, &c., the said tenancy, and the estate and interest of the plaintiff in the demised premises, in which, &c., wholly ended and determined. Surrejoinder, that the tenancy, &c., did not end and determine in manner and form alleged in the rejoinder. At the trial, before *Garrow, B.*, at the last Spring Assizes for Salop, it appeared that on the 1st of May 1810, the premises in question were demised by the defendant to the plaintiff, as tenant from year to year, and he continued so to hold them until the 25th of September 1815, when notice was given to him to quit on the 1st of May then next. On the 10th of October 1815, by an agreement in writing, made between the defendant of the one part, and the plaintiff and one Moore of the other part, defendant agreed to let and demise unto plaintiff and Moore the premises in question, to hold them unto plaintiff and Moore from the 1st of November then next, for seven years thence next ensuing, at a yearly rent of £159, payable half yearly on the 1st of May and 1st of November. Plaintiff and Moore thereby agreed to pay the rent and all taxes, except the landlord's property tax; and defendant agreed to put all the premises in tenantable repair as soon as conveniency would permit. And the plaintiff and Moore further agreed to keep the premises in repair, and leave them so at the end of the term; and lastly, it was further agreed that a lease should be forthwith drawn, in which the usual covenants were to be inserted, and particularly that the lessees should not let, set, or assign the premises, or any part thereof, without the lessor's consent in writing. The lessees took possession

¹ See *Lynch v. Lynch*, 6 Ir. L. R. 181 (1848), where the lease held to be surrendered was *pur autre vie*. See also *Amory v. Kannofooky*, 117 Mass. 361 (1875).

under this agreement, and Moore continued to occupy the premises jointly with Hamerton until April 1816, and then quitted. In June the same year, defendant not being able to get any rent, a negotiation was entered into respecting the surrender of the premises, but that proved fruitless; and defendant having obtained the keys, took and retained possession of the mill and other premises. For the defendant, it was objected that the new agreement in October 1816 was a lease, and put an end to the original tenancy of the plaintiff; or, at all events, if it was only an agreement for a lease, yet that the agreement, together with the fact of Moore's having been let into possession by virtue of it, as a joint occupier with the plaintiff, worked a surrender in law of the old tenancy. The learned judge reserved the point, and a verdict having been found for the plaintiff, a rule *nisi* to enter a nonsuit was obtained in Easter Term; and now

W. E. Taunton showed cause.

Campbell (with whom was *Oldnall Russell*), contra.

ABBOTT, C. J. In *Roe v. The Archbishop of York* [6 East, 86] the occupation by virtue of the new lease took place under a mistaken idea, that it was a good and valid lease; and when that was discovered to be void, the court very properly held that it should not operate as a surrender of the former lease. Here, there is nothing to show that the defendant refused to grant such a lease as was contracted for; and we find, in fact, that a new contract was made to let the premises to two persons instead of one, and that both entered and occupied. The lessor might then have sued both for the rent, although no distress could have been made. It frequently happens, that persons enter and occupy at a rent to be fixed in future. In such cases no distress can be made, but an action may be brought for the rent on a *quantum valebat*. It seems to me, therefore, that in the present case the old tenancy was determined, and a new joint tenancy by the plaintiff and Moore created by that which was done under the agreement with the plaintiff's concurrence.

BAYLEY, J. It is clear, since the passing of the Statute of Frauds, that a subsisting term cannot be surrendered unless by writing or by operation of law. But if a sole tenant agrees to occupy, and does occupy jointly with another, that puts an end to the former sole tenancy. The case of *Roe v. The Archbishop of York* does not apply to this case, for here the agreement connected with the joint occupation by Moore and the plaintiff, made them both tenants and therefore operated as a surrender of the separate tenancy of the latter.

HOLBOYD, J. I think that an agreement for a fresh lease would not put an end to a former tenancy, unless a new tenancy were actually created. By taking the document in question not to amount to a lease, yet the entry and holding by Moore and the plaintiff together under it, created a new tenancy either from year to year or at will; and that, according to *Mellow v. May*, Moore, 686, would terminate the old holding. Perhaps, until a lease was executed, it might not be

considered that the two held at the rent mentioned in the agreement, but still it might be a holding under the agreement. For, as was said by my Lord Chief Justice, there might be an occupation on a *quantum valebat* until the execution of the lease, and although no distress for rent could be made, yet still a tenancy would exist. For these reasons it appears to me, that the sole tenancy of the plaintiff had terminated, and that a nonsuit must be entered.

LITLEDALE, J. I am of opinion that the former tenancy of the plaintiff was put an end to by the agreement for a new lease, and the occupation by Moore and the plaintiff jointly in pursuance of that agreement. It is unnecessary to say, whether the instrument in question is or is not a lease, for where parties enter under a mere agreement for a future lease they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract. But if no rent is paid, still before the execution of a lease the relation of landlord and tenant exists, the parties having entered with a view to a lease and not a purchase. I therefore concur in thinking that a nonsuit must be entered.

Rule absolute.

DOE d. MURRELL v. MILWARD.

EXCHEQUER. 1838.

[Reported 3 M. & W. 328.]

EJECTMENT to recover possession of a house and premises at Horsham, in Sussex. The demise was laid on the 27th June, 1837. At the trial before *Litledale, J.*, at the last Summer Assizes for the above county, it appeared that the defendants were yearly tenants to the lessor of the plaintiff of the house and premises in question; and being desirous of leaving and going to occupy some premises of their own, in order to determine the tenancy, they gave the lessor of the plaintiff a notice to quit, which was in the following words:—

HORSHAM, 23d December, 1836.

We hereby give you notice that we intend to give and deliver up the possession of the messuage or tenement we now hold of you at Midsummer day next.

WILLIAM MILWARD.

ROBERT MILWARD.

To HENRY MURRELL, Horsham.

The lessor of the plaintiff accepted the notice without making any objection to it, but he gave no assent to it in writing. The tenant of the defendants having refused to quit the premises which they intended to remove to, they felt desirous of continuing in the occupation of the

plaintiff's house; and having discovered that their tenancy commenced at Christmas instead of Midsummer, they, previously to Midsummer, gave a fresh notice to quit at the Christmas following. A demand of possession having been made on the expiration of the first notice, the defendants refused to deliver up possession, on the ground that their tenancy expired at Christmas and not at Midsummer; and this ejectment was accordingly brought. It was contended at the trial, on the part of the lessor of the plaintiff, that although the notice might be insufficient as a notice to quit, in case the tenancy expired at Christmas, yet it would operate as a surrender by operation of law of the defendants' interest, it being a note in writing within the meaning of the 3d section of the Statute of Frauds. The learned judge left it to the jury to say whether, on the evidence, the tenancy commenced at Midsummer or at Christmas, and the jury found the latter. The learned judge, however, directed a verdict for the lessor of the plaintiff on the point as to the surrender, but gave the defendants leave to move to enter a nonsuit. *Tyndale* having in Michaelmas Term last obtained a rule accordingly, on the authority of *Johnstone v. Huddleston*, 4 B. & C. 922.

Thesiger and *Ogle* now showed cause.

Andrews, Serjt., and *Tyndale*, contra.

PARKE, B. I am very strongly of opinion that there cannot be a surrender to take place *in futuro*. In *Johnstone v. Huddleston*, it was held that an insufficient notice to quit, accepted by the landlord, did not amount to a surrender by operation of law, and it was there agreed that there could not be a surrender to operate *in futuro*. The case of *Aldenburgh v. Peaple* [6 C. & P. 212] was much shaken by the decision of this court in *Weddall v. Capes* [1 M. & W. 50]; for, although this precise point is not there determined, yet it is clear that the court were of opinion that the instrument could not operate as a surrender *in futuro*. As to granting a new trial, there appears to have been conflicting evidence as to the time at which the tenancy commenced; but that the jury have determined in favor of the defendant.

ALDERSON, B. There was evidence to show that this was a tenancy commencing at Christmas, and the jury have so found. We cannot therefore grant a new trial. The lessor of the plaintiff can bring a fresh ejectment, if he pleases.

The other barons concurred.

*Rule absolute to enter a nonsuit.*¹

¹ But see *Allen v. Jaquish*, 21 Wend. 628 (N. Y. 1839).

DODD v. ACKLOM.

COMMON PLEAS. 1843.

[Reported 6 M. & G. 672.]

ASSUMPSIT for use and occupation. Plea, *Non assumpsit*.

At the trial before *Erskine, J.*, at the sittings for Westminster in last Trinity Term, the following facts were proved in evidence.

On the 7th of October, 1842, the plaintiffs, by lease in writing signed by both of them, demised a house to the defendant, at a yearly rent, payable quarterly. The defendant's wife received the key from the wife of the plaintiff Dodd, and the defendant entered into possession, and after communicating with Dodd upon the subject, began to white-wash and paper part of the premises. The defendant afterwards discovered that a considerable amount of rent was in arrear to the superior landlord; that the land-tax and water-rate were also in arrear; and he thereupon remonstrated with Dodd. About Christmas the key of the front door was delivered up by the defendant's wife to Dodd, and accepted by him. It was contended on the part of the plaintiffs that this was not sufficient to constitute a surrender by act and operation of law, under the 29 Car. 2, c. 3, § 3, especially as it was not shown that the defendant's wife had authority to give up the key; and that, at any rate, a surrender to one plaintiff would not inure as a surrender to both.

The learned judge told the jury that the plaintiffs were entitled to a verdict, unless the jury thought that the plaintiffs had, by some act, prevented the defendant from having a beneficial occupation of the premises; or unless the tenancy had been put an end to by all parties before any rent became due; and, further, that if the jury thought that the defendant's wife had authority from her husband to deliver up the possession by giving up the key, and had done so, and that the plaintiff Dodd had accepted it, also having authority from the other plaintiff so to do, that would amount to a surrender of the tenancy by act and operation of law, and the defendant would be entitled to a verdict.

The jury having returned a verdict for the defendant,

Byles, Serjt., in last Trinity Term, obtained a rule *nisi* for a new trial upon the ground of misdirection, and also that the verdict was against evidence.

Talfourd, Serjt. (with whom was *Thomas*), now showed cause.

Byles, Serjt., in support of the rule.

TINDAL, C. J. Two questions arise in this case. First, whether, under the circumstances, there was a surrender of the premises by the tenant by act and operation of law, within the meaning of the Statute of Frauds; and secondly, whether, supposing there was such a surrender, Davies, one of the joint lessors, was affected by that surrender. And I am of opinion, upon the evidence, that there was a sufficient surrender, and that Davies was bound by the acts of Dodd, his co-lessor.

There was undoubtedly no formal surrender by deed or note in writing; but it is clear there may be a surrender by act and operation of law, where there is a change of possession. By the old law, before the Statute of Frauds, if a lessee took a new lease from the lessor it would operate as a surrender of the former term, although the second lease were for a shorter period than the first, or were by parol; and the reason is, that the lessee, by taking the second lease, affirms that the lessor is able to make such lease.¹ So, where there has been a change of possession, with the assent of both parties, it amounts to a surrender of the term by act and operation of law.

The present case is not like *Doe d. Huddleston v. Johnston* [M'Clel. & Y. 141], where the second tenant was never substituted, nor *Mollett v. Brayne* [2 Campb. 103], where the landlord told the tenant that he might go, but that he would hold him to the payment of rent. Here, there is evidence that after a lease in writing had been executed, the tenant finding that the ground-rent and land-tax were due, and that there was a dispute as to the payment of the water-rate, felt a disinclination to continue in possession. I am not prepared to say that if the landlords had known this state of facts, and had concealed them from the tenant, there might not have been an action for deceit by the tenant against the landlords. It is true that the defendant enters into possession, and that he proceeds to paper and whitewash some part of the premises; but some time about Christmas his wife delivers the key of the house to the plaintiff Dodd. Now the first question is, Was that a change of possession? The jury have found there was such a change, by consent of both parties; and that amounts therefore to a surrender by act and operation of law. The key was shown to have been delivered to the plaintiff Dodd; and when a given state of things has been shown to exist, the law will assume that it continues unless a change be shown. The natural presumption, therefore, is that the key remained in Dodd's possession.

One objection that has been taken is, that the defendant's wife could not bind her husband by the delivery of the key. But we must look at all the circumstances of the case. The key was first delivered by the wife of the plaintiff Dodd to the wife of the defendant; and from her Dodd afterwards received the key back. I think therefore there is no objection on the ground of the want of authority in the defendant's wife.

Then the last question is, whether the plaintiff Davies is affected by the acts of Dodd. And here we must look to the circumstances again. Davies signs the lease, it is true, but he is then lost sight of. Dodd always acts in the business. The application by the defendant as to the repairs, is made to Dodd. And there are many other circumstances in which Dodd was concerned and not Davies. I think it was properly

¹ Plowd. 106, 107 a. But there, both Portman, J., and Bromley, C. J., state that it is a surrender by the course of the common law (viz. by the act of the parties acting according to the common law), not a surrender by operation of law. — RAR.

left to the jury to say whether Dodd was not to conduct the whole business. Upon the whole therefore it appears to me that the case was properly submitted to the jury.

With respect to the evidence, there is no affidavit to negative the receipt of the key by Dodd; and I see no reason to disturb the verdict upon this ground.

I think the rule must be discharged.

COLTMAN, J. I am of the same opinion. Upon the question of surrender by operation of law, there is *prima facie* a good deal of difficulty as to the precise meaning of the term as used in the Statute of Frauds. Probably the expression referred to such surrenders as were then known, and which are mentioned in Plowden.¹ Subsequent cases have gone much further than the old doctrine. In *Thomas v. Cook*, 2 B. & A. 119; 2 Stark. N. P. C. 408, it appeared that the plaintiff had originally let the premises to the defendant as tenant from year to year. After the defendant had resided there for some time, he underlet them to one P. commencing at Christmas, 1806. At Lady Day, 1807, the defendant distrained upon P. for rent in arrear. Rent being then due from the defendant to the plaintiff, the latter gave notice to P. not to pay the rent to the defendant, but to pay it to him; and upon the defendant's refusing to take P.'s bill for the amount then due, the plaintiff agreed to take it himself in payment of the rent due from the defendant to him, saying that he would not have anything more to do with the defendant; and in the following October, the plaintiff himself distrained upon the goods of P. for rent in arrear. It was held that these circumstances constituted a valid surrender of the defendant's interest by act and operation of law, within the Statute of Frauds. So, in *Grimmann v. Legge*, 8 B. & C. 324; 2 M. & R. 438, it was also decided that where there is an agreement between the landlord and tenant that the latter shall deliver up possession, and possession is delivered up accordingly, that is a surrender by operation of law. In the present case I think there was sufficient evidence of such a surrender. *Mollett v. Brayne* and *Doe d. Huddleston v. Johnston* are quite distinct from *Grimmann v. Legge*. In *Mollett v. Brayne* it was not shown that the landlord took possession. In *Doe d. Huddleston v. Johnston* the agreement to put an end to the tenancy, was never carried out. In the present case the jury have found that the key was delivered up with the intent that the landlord should resume possession; and that amounts to a surrender by operation of law.

Then comes the further question whether Davies was bound by the act of Dodd. Upon this point I have found a little difficulty in making up my mind; but it appears to me upon the whole — the management of the business being left entirely to Dodd — that there was evidence to warrant the jury in inferring that Dodd had authority to act for his colessor Davies. That puts the case out of the rule in *Reid v. Tucker*

¹ In *Fulmerston v. Steward*, p. 106. And see Bac. Abr. tit. Leases and Terms for Years (S) 3. — RER.

[Cro. Eliz. 802], which is applicable only where one joint tenant acts for the other without authority, or where the only authority is that which is to be implied from the relation in which they stand to each other as such joint tenants.

As to the weight of evidence, I am of opinion that the verdict was correct.

MAULE, J. I also think this rule must be discharged. As to the evidence, I think it was sufficient to support the verdict. As to the alleged misdirection, I think there was none. This was an action of assumpsit for use and occupation, in which the plaintiffs say that the defendant is indebted to them for the occupation of certain premises. The defendant denies his liability. The question is, whether, on a certain day — namely on the day on which by the original lease the rent would fall due — the defendant was occupying the premises with the consent of the plaintiffs so as to give rise to an implied promise on his part. Now if one of the plaintiffs had put the defendant out of possession, it might be a question whether, it being a joint contract, they could both sue upon it. But supposing there was an authority on the part of Dodd to act for Davies in accepting the key, then there is no doubt that there was a surrender of the premises by operation of law. It seems clear, from all the circumstances, that Dodd, being the managing owner, was satisfied with the authority of Mrs. Acklom to give up the key; and that is quite sufficient against his joint tenant.

ERSKINE, J. Having the sanction of the rest of the court for the way in which I left the case to the jury, I shall say nothing as to the law. And as to the verdict, I am by no means dissatisfied with it.

*Rule discharged.*¹

LYON v. REED.

EXCHEQUER. 1844.

[Reported 13 M. & W. 285.]

PARKE, B.² This was a special case argued in Easter Term. It was an action of debt by the plaintiff, as assignee of the reversion of certain houses and rope-walks at Shadwell, holden under a lease from the Dean of St. Paul's against the defendants, who are executors of Shakespeare Reed, deceased. The plaintiff claims from the defendants nineteen years' rent, accrued due between Christmas, 1820, and Christmas, 1839, partly in the lifetime of Shakespeare Reed, who held the premises during his life, and partly since his decease, while the premises were in the possession of the defendants, his executors.

¹ See *Phené v. Popplewell*, 12 C. B. N. S. 334 (1862); *Shahan v. Herzberg*, 73 Ala. 59 (1882). Cf. *Oastler v. Henderson*, L. R. 2 Q. B. Div. 575 (1877); *Reeves v. McComeskey*, 168 Pa. 571 (1895); *Newton v. Speare Laundering Co.*, 19 R. I. 546 (1896).

² The opinion only is given.

The material facts are as follows: The premises in question are parcel of the possessions of the Dean of St. Paul's, and it appears that, on the 26th of December, 1803, the then dean demised a large estate at Shadwell, including the houses and premises in question, to two persons of the names of Ord and Planta (who were in fact trustees for the Bowes family) for a term of forty years, commencing at Christmas, 1803, and which would, therefore, expire at Christmas, 1843. On the 24th of March, 1808, Ord and Planta made an underlease of the houses and rope-walks in question to Shakespeare Reed for thirty-four years, commencing from Christmas, 1807, so that the term created by this underlease would expire at Christmas, 1841, leaving a reversion of two years in Ord and Planta. The rent sought to be recovered is the rent which accrued due on the underlease between Christmas, 1820, and Christmas, 1839. It appears that, previously to the month of October, 1811, Robert Hartshorn Barber and Francis Charles Parry were appointed by the Court of Chancery trustees for the Bowes family, in the place of Ord and Planta; and by an indenture dated the 3d of October, 1811, indorsed on the lease of 1803, all the property at Shadwell demised by that lease was assigned by Ord and Planta to Barber and Parry, the new trustees. Soon after this assignment, the Bowes family appears to have negotiated with the dean for a renewal of the lease of 1803, and accordingly a new lease was executed by the dean, dated on the 7th of April, 1812, for a term of forty years from Christmas, 1811, and which term would, therefore, endure till Christmas, 1851. Unfortunately this lease, instead of being made to Barber and Parry (the new trustees), in whom the old term (subject to the underlease to Reed) was vested, was made to Ord and Planta, the old trustees; the fact of the change of trustees, and the assignment of the 3d of October, 1811, having at the time escaped observation. In this state of things, a private Act of Parliament was passed, enabling the dean and his successor for the time being to grant leases of the Shadwell estate to the trustees of the Bowes family for successive terms of ninety-nine years, renewable forever.

The Act, which is intituled "An Act to enable the Dean of St. Paul's, London, to grant a Lease of Messuages, Tenements, Lands, and Hereditaments in the Parish of St. Paul's, Shadwell, in the County of Middlesex, and to enable the Lessees to grant Subleases for building on and repairing that Estate," received the royal assent on the 22d of July, 1812. It begins by reciting the will of Mary Bowes, whereby she bequeathed her leasehold estate at Shadwell, held under the Dean of St. Paul's (being the estate afterwards demised by the leases of 26th December, 1803, and the 7th April, 1812), to Ord and Planta, on certain trusts for the Bowes family. It then recites the lease of the 7th of April, 1812, and after stating that it would, for the reasons therein mentioned, be beneficial for all parties that the dean should be empowered to grant long leases of the Shadwell property, perpetually renewable, and further stating that Ord and Planta were desirous

of being discharged from their trust, and that John Osborn and John Burt had agreed to act as trustees in their place; it enacted, that it should be lawful for the dean and his successors for the time being, and he and they are thereby *required*, on a surrender of the existing lease, to demise the Shadwell estate to Osborn and Burt, their executors, administrators, and assigns, for a term of ninety-nine years, and at the end of every fifty years to grant a new lease on payment of a nominal fine, with various provisions (not necessary to be stated), for securing to the dean and his successor a proportion of all improved rents to be thereafter obtained. And by the second section of the Act it is enacted, that, immediately on the execution by the dean of the first lease for ninety-nine years to be granted in pursuance of the Act, the lease of the 7th of April, 1812, should become void. It is plain, from the provisions contained in this Act, that the persons by whom it was obtained were not aware, or had forgotten that, in the month of October preceding, Ord and Planta had assigned their interest in the property to Barber and Parry, the new trustees appointed by the Court of Chancery. In pursuance of the Act of Parliament, by an indenture of three parts, dated the 31st day of August, 1812, and made between the dean of the first part, Thomas Bowes (the party beneficially interested for his life) of the second part, and Osborn and Burt of the third part, the dean demised the Shadwell property to Osborn and Burt for a term of ninety-nine years, and the demise is expressed to be made as well in consideration of the surrender of the lease of the 7th of April, 1812, "*being the lease last existing*," as also of the rents and covenants, &c.

Mr. Bowes, and Osborn and Burt, his trustees, appear to have discovered, before the month of January, 1814, the mistake into which they had fallen, and two further deeds were then executed for the purpose of curing the defect. By the former of these deeds, which bears date the 6th January, 1814, and is made between Barber and Parry of the one part, and the dean of the other part, reciting that, at the time of the granting of the lease of the 7th of April, 1812, the estate and interest created by the original demise of the 20th of December, 1803, was vested in Barber and Parry, and also reciting that the fact of the assignment to them by the deed of the 3d of October, 1811, was not known to the parties by whom the said Act was solicited, it is witnessed, that Barber and Parry did bargain, sell, and surrender to the dean the whole of the said Shadwell estate, to the intent that the term of forty years, created by the lease of the 26th of December, 1803, might be merged in the freehold, and that the dean might execute a new lease to Osborn and Burt according to the said Act. By the other deed, which bears date the 29th of January, 1814, and is made between the dean of the first part, the said Thomas Bowes of the second part, and the said Osborn and Burt, of the third part; the dean, *in consideration of the effectual* surrender of the two prior leases of the 26th of December, 1803, and the 7th of April, 1812, and

for the other considerations therein mentioned, demised the Shadwell estate, pursuant to the said Act of Parliament, to Osborn and Burt, their executors, administrators, and assigns, for a term of ninety-nine years. The interest of Osborn and Burt, under these two leases to them, has, by various assignments, become vested in the plaintiff; and there is no doubt but that he is entitled to recover the rent in question in this action, if Osborn and Burt would have been so entitled.

Such being the principal facts, we must consider how they bear on the several issues raised by the pleadings. The declaration, after stating the demise from the dean to Ord and Planta in 1808, and the underlease from them to Reed in 1808, goes on to state, that, by the deed of the 8d of October, 1811, Ord and Planta assigned all their interest in the premises to Barber and Parry, and that the dean, being seised of the reversion expectant on the term of forty years so assigned to Barber and Parry, by the indenture of the 31st of August, 1812, demised the premises to Osborn and Burt for a term of ninety-nine years, by virtue whereof they became entitled to the reversion for that term. The declaration then goes on to state that, by the indenture of the 6th of January, 1814, Barber and Parry assigned their interest to the dean, to the intent that he might grant a new lease to Osborn and Burt; and that afterwards, on the 29th day of the same month of January, 1814, the dean, by the indenture of that date, made a new demise of the premises to Osborn and Burt for a fresh term of ninety-nine years, they by the same indenture surrendering the former term created by the demise of the 31st of August, 1812. The declaration then traces the title in the present plaintiff by assignment from Osborn and Burt previously to Christmas, 1820, and so claims title to the rent accrued due after that date.

To this declaration the defendants pleaded six pleas: First, a plea traversing the averment that, at the time of the demise to Osborn and Burt of the 31st of August, 1812, the dean was seised in fee of the reversion. Secondly, a plea traversing that demise. Thirdly, a plea traversing the assignment by Barber and Parry to the dean, to the intent that he might grant a new lease to Osborn and Burt. Fourthly, a plea traversing the surrender by Osborn and Burt of the first term of ninety-nine years. Fifthly, a special plea stating the indenture of the 7th of April, 1812, whereby Ord and Planta became entitled to the reversion for forty years from Christmas, 1811, and so continued until, up to, and after the execution of the indenture of the 29th of January, 1814. Sixthly, a plea traversing the demise to Osborn and Burt by the indenture of the 29th of January, 1814. Issue was joined on all the pleas except the fifth, and to that the plaintiff replied, that, after the making of the lease of the 7th of April, 1812, and before the lease of the 31st of August, 1812, the private Act of Parliament was passed, authorizing the dean, on the surrender of the existing lease, to grant a lease for ninety-nine years to Osborn and Burt; and the replication then avers that the lease of the 31st of August, 1812, was duly made

in pursuance of the Act, and that, at the time when it was made, the lease of the 7th of April, 1812, was duly surrendered. To this the defendants rejoin, traversing the surrender of the lease of the 7th of April, 1812, and on this issue was joined. The second, third, and sixth issues, it will be observed, are mere traverses of the execution of deeds which are found by the special case to have been duly executed; and, as the traverse merely puts in issue the fact of the execution, and not the validity of the deeds or the competency of the parties to make them, the verdict on those issues must certainly be entered for the plaintiff; and so must that on the fourth issue, whereby the defendant traverses the surrender by Osborn and Burt of the first term of ninety-nine years, when the demise of the second term was made to them. It is quite clear that the acceptance of the second demise was of itself a surrender in law of the first, even if no surrender in fact was made. For whom, then, is the verdict on the remaining issues, the first and fifth, to be entered? The issue on the fifth plea is, it will be observed, whether the lease of the 7th of April, 1812, was duly surrendered at the time of the making of the indenture of the 31st August, 1812. And the issue on the first plea is substantially the same; for if the plaintiff succeeds in showing that the indenture of the 7th April, 1812, was duly surrendered as set forth in his declaration, then it follows that the dean was at that time seised of the reversion, and so the plaintiff must succeed on the first issue; if, on the other hand, he fail on the fifth issue, he must also fail on the first.

The real question, therefore, for our consideration is, whether the plaintiff has succeeded in showing that the term of the 7th April was surrendered previously to the execution of the indenture of the 31st of August, 1812. On this subject it was argued by the counsel for the plaintiff, first, that the circumstances of the case warranted the conclusion that there was an actual surrender in fact; and if that be not so, then, secondly, that they prove conclusively a surrender in point of law.

We will consider each of these propositions separately. And first, as to a surrender in fact. The subject-matter of the lease of the 7th April, 1812, was, it must be observed, a reversion; a matter, therefore, lying in grant, and not in livery, and of which, therefore, there could be no valid surrender in fact otherwise than by deed; and what the plaintiff must make out, therefore, on this part of his case is, that, before the execution of the first lease for ninety-nine years, Ord and Planta, by some deed not now forthcoming, assigned or surrendered to the dean the interest which they had acquired under the lease of the 7th of April. But what is there to warrant us in holding that any such deed was ever executed? *Prima facie* a person setting up a deed in support of his title is bound to produce it. But undoubtedly this general obligation admits of many exceptions. Where there has been long enjoyment of any right, which could have had no lawful origin except by deed, then, in favor of such enjoyment, all necessary deeds may be

presumed, if there is nothing to negative such presumption. Has there, then, in this case, been any such enjoyment as may render it unnecessary to show the deed on which it has been founded? The only fact as to enjoyment stated in this case has precisely an opposite tendency; it is stated, so far as relates to the property, the rent of which forms the subject of this action, namely the houses, &c., underlet to Reed, that no rent has ever been paid; and therefore, as to that portion of the property included in the lease of April, 1812, there has certainly been no enjoyment inconsistent with the hypothesis that that lease was not surrendered.

The circumstances on which the plaintiff mainly relies as establishing the fact of a surrender by deed, are the statements in the two leases to Osborn and Burt, that they were made in consideration, *inter alia*, of the surrender of the lease of the 7th April, and the fact of that lease being found among the dean's instruments of title. These circumstances, however, appear to us to be entitled to very little weight. The ordinary course pursued on the renewal of a lease is for the lessee to deliver up the old lease on receiving the new one, and the new lease usually states that it is made in consideration of the surrender of the old one. No surrender by deed is necessary, where, as is commonly the case, the former lessee takes the new lease, and all which is ordinarily done to warrant the statement of the surrender of the old lease as part of the consideration for granting the new one, is, that the old lease itself, *the parchment on which it is engrossed*, is delivered up. Such surrender affords strong evidence that the new lease has been accepted by the old tenant, and such acceptance undoubtedly operates as a surrender by operation of law, and so both parties get all which they require. We collect from the documents that this was the course pursued on occasion of making the lease of the 26th of December, 1803, and the lease of the 7th of April, 1812; and we see nothing whatever to warrant the conclusion that anything else was done on occasion of making the lease to Osborn and Burt.

Where a surrender by deed was understood by the parties to be necessary, as it was with reference to the term assigned to Barber and Parry, there it was regularly made, and the deed of surrender was indorsed on the lease itself. There is no reason for supposing that the same course would not have been pursued as to the lease of April, 1812, if the parties had considered it necessary. If any surrender had been made, no doubt the deed would have been found with the other muniments of title. No such deed of surrender is forthcoming, and we see nothing to justify us in presuming that any such deed ever existed. We may add, that the statement in the new lease, that the old one had been surrendered, cannot certainly of itself afford any evidence against the present defendants, who are altogether strangers to the deed in which those statements occur.

It remains to consider whether, although there may have been no surrender in fact, the circumstances of the case will warrant us in hold-

ing that there was a surrender by act and operation of law. On the part of the plaintiff it is contended, that there is sufficient to justify us in coming to such a conclusion, for it is said, the fact of the lease of the 7th of April, 1812, being found in the possession of the dean, even if it does not go the length of establishing a surrender by deed, yet furnishes very strong evidence to show, that the new lease granted to Osborn and Burt was made with the consent of Ord and Planta, the lessees under the deed of the 7th of April, 1812. And this, it is contended, on the authority of *Thomas v. Cook*, 2 B. & Ald. 119, and *Walker v. Richardson*, 2 M. & W. 882, is sufficient to cause a surrender by operation of law.

In order to ascertain how far those two cases can be relied on as authorities, we must consider what is meant by a surrender by operation of law. This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman, and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent, and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor.

It is needless to multiply examples; all the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of *intention*. The surrender is not the result of intention. It takes place independently, and even in spite of intention. Thus, in the cases which we have adverted to of a lessee taking a second lease from the lessor, or a tenant for life accepting a feoffment from the party in remainder, or a lessee accepting a rent-charge from his lessor, it would not at all alter the case to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered. In all these cases the surrender would be the act of the law, and would prevail in spite of

the intention of the parties. These principles are all clearly deducible from the cases and doctrine laid down in Rolle, and collected in Viner's Abridgment, tit. "Surrender," F. and G., and in Comyns' Dig., tit. "Surrender," T. and I. 2, and the authorities there referred to. But, in all these cases, it is to be observed, the owner of the particular estate, by granting or accepting an estate or interest, is a party to the act which operates as a surrender. That he agrees to an act done by the reversioner is not sufficient. Brooke, in his Abridgment, tit. "Surrender," pl. 48, questions the doctrine of Frowike, C. J., who says: "If a termor agrees that the reversioner shall make a feoffment to a stranger, this is a surrender," and says he believes it is not law; and the contrary was expressly decided in the case of *Swift v. Heath*, Carthew, 110, where it was held, that the consent of the tenant for life to the remainderman making a feoffment to a stranger, did not amount to a surrender of the estate for life, and to the same effect are the authorities in Viner's Abr., "Surrender," F. 3 and 4.

If we apply these principles to the case now before us, it will be seen that they do not at all warrant the conclusion, that there was a surrender of the lease of the 7th of April, 1812, by act and operation of law. Even adopting, as we do, the argument of the plaintiff, that the delivery up by Ord and Planta of the lease in question affords cogent evidence of their having consented to the making of the new lease, still there is no estoppel in such a case. It is an act which, like any other ordinary act *in pais*, is capable of being explained, and its effect must therefore depend, not on any legal consequence necessarily attaching on and arising out of the act itself, but on the intention of the parties. Before the Statute of Frauds, the tenant in possession of a corporeal hereditament might surrender his term by parol, and therefore the circumstance of his delivering up his lease to the lessor might afford strong evidence of a surrender in fact; but certainly could not, on the principles to be gathered from the authorities, amount to a surrender by operation of law, which does not depend on intention at all. On all these grounds, we are of opinion that there was in this case no surrender by operation of law, and we should have considered the case as quite clear, had it not been for some modern cases, to which we must now advert.

The first case, we believe, in which any intimation is given that there could be a surrender by act and operation of law by a demise from the reversioner to a stranger with the consent of the lessee, is that of *Stone v. Whiting*, 2 Stark. 236, in which Holroyd, J., intimates his opinion that there could; but there was no decision, and he reserved the point. This was followed soon afterwards by *Thomas v. Cook*, 2 Stark. 408; 2 B. & Ald. 119. That was an action of debt by a landlord against his tenant from year to year, under a parol demise. The defence was, that the defendant Cook, the tenant, had put another person (Parkes) in possession, and that Thomas, the plaintiff, had, with the assent of Cook, the defendant, accepted Parkes as his

tenant, and that so the tenancy of Cook had been determined. The Court of King's Bench held, that the tenancy was determined by act and operation of law.

It is matter of great regret that a case involving a question of so much importance and nicety, should have been decided by refusing a motion for a new trial. Had the case been put into a train for more solemn argument, we cannot but think that many considerations might have been suggested, which would have led the court to pause before they came to the decision at which they arrived. Mr. Justice Bayley, in his judgment says, the jury were right in finding that the original tenant assented, because, he says, it was clearly for his benefit, an observation which forcibly shows the uncertainty which the doctrine is calculated to create.

The acts *in pais* which bind parties *by way of estoppel* are but few, and are pointed out by Lord Coke, Co. Lit. 352 a. They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as *livery, entry, acceptance of an estate*, and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. But in what uncertainty and peril will titles be placed, if they are liable to be affected by such accidents as those alluded to by Mr. Justice Bayley. If the doctrine of *Thomas v. Cook* should be extended, it may very much affect titles to long terms of years, mortgage terms, for instance, in which it frequently happens that there is a consent, express or implied, by the legal termor to a demise from the mortgagor to a third person. To hold that such a transaction could, under any circumstances, amount to a surrender by operation of law, would be attended with most serious consequences.

The case of *Thomas v. Cook* has been followed by others, and acted upon to a considerable extent. Whatever doubt, therefore, we might feel as to the propriety of the decision, that in such a case there was a surrender by act and operation of law, we should probably not have felt ourselves justified in overruling it. And, perhaps, the case itself, and others of the same description, might be supported upon the ground of the actual occupation by the landlord's new tenants, which would have the effect of eviction by the landlord himself in superseding the rent or compensation for use and occupation during the continuance of that occupation. But we feel fully warranted in not extending the doctrine of that case, which is open to so much doubt, especially as such a course might be attended with very mischievous consequences to the security of titles.

If, in compliance with these cases, we hold that there is a surrender by act and operation of law where the estates dealt with are corporeal and in possession, and of which demises may therefore be made by parol, or writing, and where there is an open and notorious shifting of

the actual possession, it does not follow that we should adopt the same doctrine where reversions or incorporeal hereditaments are disposed of, which pass only by deed. With respect to these, we think we ought to abide by the ancient rules of the common law, which have not been broken in upon by any modern decision; for that of *Walker v. Richardson*, 2 M. & W. 882, which has been much relied on in argument, is not to be considered as any authority in this respect, inasmuch as the distinction that the right to tolls lay in grant was never urged, and probably could not have been with success, as the leases, perhaps, passed the interest in the soil itself. Moreover, according to the report of that case, it would seem that the new lessees had, before they accepted their lease, become entitled to the old lease by an actual assignment from the old lessee. If this were so, then there could, of course, be no doubt but that the old lease was destroyed by the grant and acceptance of the new one. It is, however, right to say, that we believe this statement to have crept into the report inadvertently, and that there was not, in fact, any such assignment. The result of our anxious consideration of this case is, that the verdict on the issues on the first plea and on the rejoinder to the replication to the fifth plea, must be entered for the defendants, and as those pleas go to the whole cause of action, the judgment must be for them.

In the case, as it was originally stated, it did not appear that there had been any change of dean since the original demise in 1808. We desired to have the case amended on this point, in order that the fact might appear, if the case should be turned into a special verdict. For during the incumbency of the dean, who made the lease for ninety-nine years, that lease would be good independently of the private Act, and as the immediate reversion, on which the defendants' lease depended, was assigned to the dean by Barber and Parry previously to the demise of the 29th of January, 1814, that reversion undoubtedly passed to Osborn and Burt, and would enable them, or the plaintiff claiming under them, to sue for the rent so long as the estate of the same dean continued, whether the lease for ninety-nine years was or was not warranted by the Act; and so the plaintiff might possibly have been entitled to judgment *non obstante veredicto*. It appears by the case as now amended, that the Bishop of Lincoln who was the dean granting the leases of ninety-nine years, ceased to be dean, and was succeeded by Dr. Van Mildert in October, 1820, before any part of the rent sought to be recovered in this action had accrued due, and therefore no question on this head arises.

Neither will the second private Act stated in the case aid the plaintiff. It appears that, in 1820, the difficulties in which the parties had involved themselves by neglecting to get a proper surrender of the lease of the 7th of April, 1812, was brought under the consideration of the Court of Chancery, in a suit there pending relative to the affairs of the Bowes family. Master Cox, by his report of the 15th of February,

1820, stated, that he was of opinion that both the leases of ninety-nine years were void, the first because it was made when the original term of forty years was outstanding in Barber and Parry, and the latter, because at the time of its creation the lease of the 7th of April, 1812, was still outstanding, thus showing clearly his opinion, that nothing had happened to cause a surrender of that lease by operation of law; and he recommended that an Act of Parliament should be obtained to remedy the defect. His report was afterwards confirmed, and the second Act stated in the case was accordingly obtained. That Act received the royal assent on the 15th of July, 1820, and it was thereby enacted, that the lease of the 29th of January, 1814, should be valid to all intents and purposes; and further, that immediately after the passing of the Act, the leases of the 26th of December, 1803, the 7th of April, 1812, and the 31st of August, 1812, should be void to all intents and purposes. The effect of this was to destroy altogether the reversion in respect of which the rent now sought to be recovered was payable, and it may therefore well be doubted whether, even if all the issues had been found for the plaintiff, he could have had judgment. It is, however, sufficient for us to say that the Act certainly does not entitle the plaintiff to anything which he would not have been entitled to if no such Act had passed. More especially when it is considered, that, by the saving clause, the defendants are excepted out of the operation of the Act. The result therefore is, that the verdict on the first and fifth issues must be entered for the defendant, and on the other issues for the plaintiff, and the judgment will be for the defendant.

Judgment for the defendant.

Watson, for the plaintiff.

Erle, for the defendants.

NICKELLS v. ATHERSTONE.

QUEEN'S BENCH. 1847.

[Reported 10 Q. B. 944.]

DEBT on a demise of rooms &c., by plaintiff to defendant for three years from March 1st, 1844, at the yearly rent of £100, payable quarterly in advance; averment, that defendant entered, and was possessed until 1st September, 1845.

Pleas. 1. Traversing the demise. 2. Eviction by plaintiff. 3. Surrender. Traverses of pleas two and three.

On the trial, before *Wightman*, J., at the London sittings after Easter Term, 1846, the following appeared to be the material facts. The rooms were let by plaintiff to defendant under a memorandum of agreement dated 26th February, 1844, on the terms specified in the declaration. The defendant entered, and paid rent for the first two

quarters, beginning respectively March 1st and June 1st, 1844. In August, 1844, the defendant removed his property from the rooms and left them, and applied to the plaintiff to take them off his hands. The plaintiff refused. The defendant then asked the plaintiff to let the rooms for him; and the plaintiff said he would try to do so. On 3d September, 1844, the defendant being then absent, the plaintiff applied to his daughter for the rent due on 1st September. In reply, the following letter was written by the defendant to the plaintiff.

EDINBURGH, 11th September, 1844.

SIR, — I heard from my daughter that you expressed your intention to take legal measures against me unless the ensuing quarter rent were paid on the very day commencing the quarter. I consider such a step would be harsh; and under present circumstances it would be utterly useless. It will probably be six months before I can finally leave Scotland, as the greater part of my business connection lies in this country. I trust, however, that you may be able to let the rooms to some other person, and on better terms.

E. ATHERSTONE.

On 29th September, 1844, the plaintiff, without any further communication with the defendant, let the room in question, together with some others, to a Mr. Bullock, for three years from that day, at £120 a year, payable quarterly in advance. Mr. Bullock paid the first two quarters, but subsequently became insolvent. The present action was then brought, claiming from the defendant the four quarters' rent from September 1st, 1844, to September 1st, 1845, under the agreement of February, 1844; but credit was given to the defendant for the first two quarters' rent, which the plaintiff had received from Bullock.

Wightman J., left it to the jury to say whether the plaintiff agreed to the terms offered by the defendant in his letter of 11th September, and accepted Bullock as his tenant in substitution and discharge of the defendant. The jury found that the plaintiff did accept Bullock as his tenant in discharge of the defendant. Verdict for the plaintiff, under the direction of the learned judge, on the first issue, for the defendant on the other issues, with leave to the plaintiff to move to enter a verdict for himself for £50, on either or both the other issues.

A rule *nisi* having been accordingly obtained,

Bramwell showed cause.¹

Watson and *Hugh Hill*, contra.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered judgment.

In this case, the defendant being the lessee in possession of the premises, the plaintiff, his landlord, with his consent, let them to a new tenant, and put him in possession, and discharged the defendant from his liability as tenant.

The judge who tried the case held that these facts constituted a surrender by operation of law, and, therefore, a defence against the plain-

¹ Before LORD DENMAN, C. J., PATTERSON, WIGHTMAN, and ERLE, JJ.

tiff's claim for rent. The correctness of that holding has been brought into question before us in consequence of the opinion expressed by the Court of Exchequer in *Lyon v. Reed*, 13 M. & W. 285, 305-310; but we are of opinion that it is correct. If the expression "surrender by operation of law" be properly "applied to cases where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued," it appears to us to be properly applied to the present. As far as the plaintiff, the landlord, is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the defendant's term. As far as the new tenant is concerned, the same is true. As far as the defendant, the owner of the particular estate in question, is concerned, he has been an active party in this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession, and so enabling the new tenant to enter.

If the defendant cannot technically be said to be estopped from disputing the validity of the estate of the new tenant, still, according to the doctrine of *Pickard v. Sears*, 6 A. & E. 469, he would be precluded from denying it with effect; and the result is nearly the same as an estoppel. If an act which anciently really was, in contemplation of law, and has always continued to be, an act of "notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like" (*Lyon v. Reed*, 13 M. & W. 309), be required as requisite for a surrender by operation of law, and if the acts of the three parties are regarded together, this requisite is here found. Indeed the notoriety is essentially greater than that which accompanies a parol redemise between the same landlord and tenant, which is a clear surrender by operation of law. In the present case three are concerned, and there is an actual change of possession; in the other, two are concerned, and there is no change of possession. This surrender by operation of law has been judicially recognized in each of the superior courts: *Matthews v. Sawell*, 8 Taunt. 270; *Thomas v. Cook*, 2 B. & Ald. 119; *Walker v. Richardson*, 2 M. & W. 882; *Bees v. Williams*, 2 C. M. & R. 581, s. c. Tyr. & G. 23; and held valid at Nisi Prius in *Stone v. Whiting*, 2 Stark. N. P. C. 235, and many subsequent cases. When the decisions on a point are numerous and uniform, and carry into effect the lawful intentions of the parties according to the truth, and are opposed by no principle, the law on the point ought not to be considered doubtful because the reported decisions are only of modern date, as the fact that the reports on the point do not begin till lately may arise from there being no question on the point in earlier times. Indeed, in 1809, it seems probable that a restoration of the possession to the landlord and a discharge of the tenant by him was considered a surrender by operation of law. The defence in *Mollett v. Brayne*, 2 Campb. 103, was shaped on that

principle; but, as the evidence failed to show a change of possession by mutual consent of landlord and tenant, the defence failed. In *Whitehead v. Clifford*, 5 Taunt. 518, where there was such change of possession by mutual consent, the defence to a claim for use and occupation succeeded; and the court distinguished the case from *Mollett v. Brayne*, for that reason.

Where there is an agreement to surrender a particular estate, and the possession is changed accordingly, it is more probable that the legislature intended to give effect to an agreement so proved, as a surrender by operation of law, than to allow either party to defeat the agreement by alleging the absence of written evidence. Although we do not assent to the observations upon the line of cases, from *Thomas v. Cook*, downwards, in the learned and able judgment given in *Lyon v. Reed*, 13 M. & W. 285, we wish to express our entire concurrence in the decision of that case. The question there was not upon the estate of the tenant in possession of the premises, but upon the title of the plaintiff as assignee of the reversion; whether a lease of the reversion, granted to Ord and Planta in 1812, for ninety-nine years, could be presumed to be surrendered, from the fact that such lease was found among the deeds of the tenant in fee, who had granted in 1814 a term in the reversion to Osborn and Burt, through whom the plaintiff claimed. There was no change in the possession of the land. No actual change in the possession of the reversion could be made apparent; and the facts stated lead to the conclusion that Ord and Planta did not know of the demise to Osborn and Burt; but the probability is, that the term in them as trustees had been forgotten at the time when their concurrence was requisite for the new lease.

As the defendant is entitled to our judgment on this point, it is not necessary to consider the effect of his letter as evidence of a surrender.

*Rule discharged.*¹

¹ In *Wallis v. Hands*, L. R. [1893] 2 Ch. 75, N. had in 1884 leased certain land to P. and others. In 1887 N. leased the same and other lands to plaintiff. This was done with the oral assent of the lessees under the lease of 1884. The plaintiff did not enter into possession of the premises covered by the lease of 1884. Chitty, J. said, page 81:—"The plaintiff (as already stated) has never been in possession of the property demised by the lease of 1887; consequently, as between the lessees of 1884 and those claiming under them on the one hand, and the plaintiff on the other, there has been no change of possession. In these circumstances it is contended for the plaintiff, as a proposition of law, that the grant of a new lease in possession, with the oral assent merely of a person in possession under a prior subsisting lease, operates as a surrender in law of the prior lease; and, consequently, that such grant and mere oral assent are sufficient to take the case out of the operation of the 3rd section of the *Statute of Frauds*, which enacts that no leases shall be surrendered unless by deed or note in writing, or by act and operation of law. . . . The question again raises the controversy which subsisted at one time between the Courts of King's Bench and the Exchequer, illustrated by *Thomas v. Cook*, 3 B. & Al. 119, and *Lyon v. Reed*, 13 M. & W. 285, and discussed at length in *Smith's Leading Cases*, 8th ed. vol. ii. p. 884 *et seq.* But it appears to me that this controversy was, so far as concerns the question before me, set at rest by the judgment of the Court of Exchequer in *Davison v. Gent*, 1 H. & N. 744. In *Thomas v. Cook* there was in

FENNER v. BLAKE.

QUEEN'S BENCH DIVISION. 1900.

[Reported L. R. [1900] 1 Q. B. 426.]

APPEAL from the county court of Norfolk.

In March, 1895, the defendant became tenant to the plaintiff of certain premises upon an agreement for a three years' tenancy expiring at Lady Day, 1898. Upon the expiry of that term the defendant continued in possession of the premises as tenant from year to year. In December, 1898, he asked the plaintiff to release him from his tenancy, and it was then orally agreed between them that the defendant's tenancy should terminate at Midsummer, 1899, unless in the meantime another tenant were found. With the defendant's assent, a notice board was put up upon the premises stating that they were to let. In February the plaintiff found a purchaser, and, relying upon the defendant's agreement to surrender the premises on June 24, he entered into a contract with the purchaser to sell him the premises and to deliver possession on that date. On June 24 the defendant refused to give up possession. The plaintiff brought ejectment. At the hearing it was contended for the defendant that the agreement to surrender the premises in June,

fact a change of possession, the old tenant *Cook* having gone out of possession when the plaintiff accepted *Perkes* as his tenant. (See the observations of Lord *St. Leonards* in *Creagh v. Blood*, 3 J. & Lat. 160). In his judgment in *Davison v. Gent* Chief Baron *Pollock* states the law thus, (1 H. & N. 749): 'It must therefore be taken to be established that where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law.' This statement appears to me not to be qualified by any subsequent expressions in the same judgment. It substantially reconciles *Thomas v. Cook*, 2 B. & Al. 119, with the principles enunciated by Baron *Parke* in *Lyon v. Reed*, 13 M. & W. 285, so far as relates to leases in possession. It is not, perhaps, of any great practical importance in which of the two following ways the proposition of law is stated: (1.) there is no surrender by operation of law unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents; or (2.) the change of possession is a necessary part of the consent. I prefer, however, the first, as being the more correct form. To hold that mere oral assent to the new lease operates as a surrender in law would be a most dangerous doctrine: it would practically amount to a repeal of the *Statute of Frauds*, and let in all the mischief against which the statute intended to guard; the policy of that statute is carried still further by the statute 8 & 9 Vict. c. 106, s. 3, which requires a deed in cases where formerly a mere writing would have sufficed. The foundation of the doctrine that the acceptance of a new lease by an existing tenant operates as a surrender in law is estoppel by act *in pais*, the law attributing the force of estoppel to certain acts of notoriety, such as livery of seisin, entry, acceptance of an estate, and the like; and the grant of a new lease to a stranger, with the tenant's assent, and change of possession preceding or following the lease, bring such a case within the scope of the same doctrine, which mere oral assent would not do."

See also *Davison v. Gent*, 1 H. & N. 744 (1857). Cf. *Bailey v. Wells*, 8 Wis. 141 (1859).

not being in writing, was void, and that his tenancy was consequently still subsisting. The county court judge gave judgment for the plaintiff.

The defendant appealed.

T. Willes Chitty, for the appellant.

H. Dobb, for the respondent.

Chitty, in reply.

CHANNELL, J. In this case I am of opinion that the judgment of the county court judge must be affirmed. There appear to me to be two grounds upon which the plaintiff is entitled to succeed.

The defendant was a tenant who had an ordinary tenancy from year to year terminable by notice in March. In December, 1898, the defendant, being desirous of getting rid of his tenancy and not having given notice to quit in the following March, had a meeting with his landlord, the plaintiff, when they mutually agreed by parol that the tenancy should be determined in the following June. The question is, What is the effect of that agreement? It is by no means uncommon for a landlord and tenant to agree by parol to a variation of the terms of an existing tenancy, such as an alteration in the amount of the rent, and at all events in cases where the tenancy was such that the contract creating it was not required by law to be in writing, as in the case of a tenancy from year to year, a parol variation of the terms as to the rent would be perfectly good and sufficient in point of law. And if an agreement as to an alteration of the rent may be made by parol, why may not equally an agreement as to an alteration of the date at which the tenancy is to be determinable? It seems to me that the effect of the agreement in December was that the defendant accepted a new tenancy for six months terminable in June in lieu of the existing tenancy. And if so, then all the authorities agree that the acceptance of a new tenancy works a surrender of the old tenancy by operation of law. On that ground I am of opinion that the plaintiff was entitled to maintain his action.

But there is also another ground which I think is equally applicable, and which I think is not displaced by *Lyon v. Reed*, 13 M. & W. 285, one of the cases on which Mr. Chitty relied. It seems to me that in this case the facts raise an ordinary case of estoppel. The defendant, having agreed to give up possession of the premises in June, assented to the landlord selling the premises with a right of the purchaser to possession in June. The landlord accordingly sold to a purchaser with a right to possession at that date, and thereby rendered himself liable to an action at the suit of the purchaser if he was unable to give him possession at that date. Under those circumstances it seems clear that the tenant is estopped from saying that his tenancy, whatever it was in fact, was not a tenancy ending in June. It is an invariable practice, when a reversion is put up to auction, for the vendor to state what the terms of the tenancy are and when it expires; and if the tenant is communicated with before the sale and agrees that his tenancy is of such and such a

character, and thereupon it is so described, and the sale takes place upon that footing, it is impossible to say that the tenant is not estopped from saying that the tenancy is other than that upon the footing of which he allowed the property to be sold to the purchaser. On this ground of estoppel also I think that the judgment of the county court judge may be supported.

BUCKNILL, J. I am of the same opinion. The effect of the evidence stated in the judge's notes seems to be this — that the defendant asked to be released from his tenancy, and the landlord consented, and they then and there agreed that there should be a new tenancy for six months terminating in June. If that is the effect of it, then the acceptance of the new tenancy amounted to a surrender by operation of law. I also entirely agree with what my brother Channell has said upon the point as to estoppel. Upon both those grounds I think the judgment of the county court judge was right. The appeal must, therefore, be dismissed.

Appeal dismissed.
*Leave to appeal refused.*¹

SCHIEFFELIN v. CARPENTER.

SUPREME COURT OF JUDICATURE OF NEW YORK. 1836.

[Reported 15 Wend. 400.]

THIS was an action of *covenant*, tried at the New York Circuit in April, 1834, before the Hon. *Ogden Edwards*, one of the circuit judges.

The plaintiff declared on a lease under seal, made by him to Edmund T. Carpenter, bearing date 1st April, 1829, demising a dwelling-house and a lot of ground of $5\frac{1}{2}$ acres, situate in the twelfth ward of the city of New York, for the term of *six years*, subject to an *annual rent* of \$325, to be paid quarterly. The lease was a tripartite indenture, Daniel S. Hawkhurst and Daniel Carpenter being parties thereto, and uniting with the tenant in the covenants to be performed on his part; and they were joined as defendants in the suit with the tenant. The defendants, amongst other things, *covenanted* for the payment of the rent; that the tenant should, *during the term*, keep the dwelling-house, fences, and every part of the demised premises in good condition and repair, and, at the expiration of the term, yield them up in like good repair; that he would not remove, injure or destroy any root, plant, bush or tree growing on the premises, or suffer the same to be done; that he would not underlet or assign the premises, either directly or by operation of law, without the written consent of the landlord; and that during the term, the dwelling-house should not be occupied as a public

¹ See *Warren v. Lyons*, 152 Mass. 310 (1890).

house, inn or tavern, without the like written consent. The plaintiff assigned, as breaches of the covenants: 1. That on the 1st July, 1833, there was one year's rent in arrear and unpaid; 2. That on the 1st January, 1831, the tenant permitted the dwelling-house and fences, &c., to fall into bad condition, and to become ruinous and to decay for the want of necessary repairs, and so permitted them to remain until the commencement of the suit; 3. That on the 1st January, 1831, he suffered fruit trees, gooseberry bushes, asparagus roots, and ornamental flowering plants growing on the premises to be lopped, uprooted, removed and destroyed by persons and animals; 4. That from 1st November, 1832, until 1st June, 1833, the dwelling house was used and occupied as a *public house*, without the consent of the plaintiff. The defendants pleaded the *general issue*, and gave notice of various matters to be proved on the trial.

On the trial of the cause, the plaintiff claimed to recover the *rent* of a quarter of a year, ending 1st July, 1833, and *damages* for breaches of the covenants to keep the premises in repair, and not to injure them, &c. The plaintiff proved that the premises were in good repair at the date of the lease, and when the tenant went in possession; and that in February, 1833, the dwelling house was in a ruinous state, the fences prostrated, and the garden wholly destroyed, and that the expense of putting the premises in repair would be between \$400 and \$500. He also proved that the premises had been occupied for a year by two men of the name of Wood and Matthews, who were railroad contractors, and had many persons in their employ who resided on the premises. The defendant offered to prove that the plaintiff held the demised premises only *in right of his wife*, and insisted that inasmuch as an action of *waste* might be brought in the name of the *husband and wife* in the character of *reversioners*, the claim of damages for injury to the demised premises ought not to be sustained in the present suit: the evidence was rejected by the judge. The defendants also offered to prove that in the autumn of 1831, an agreement was entered into between the plaintiff, the defendant Edmund T. Carpenter and two persons of the names of Mills and Owen, that Carpenter should quit and surrender up the premises to the plaintiff, that the lease declared on should be delivered up and cancelled, and a new lease of the premises should be executed by the plaintiff to Mills and Owens for the term of eight or ten years. That in pursuance of such agreement, Carpenter, in the autumn of 1831, surrendered up the premises to the plaintiff, and paid all the rent then due to the plaintiff, and Mills and Owen took possession of the premises and occupied the same pursuant to such agreement as tenants to the plaintiff, who accepted them as such, and received rent from them. That Mills and Owen occupied the premises until the autumn of 1832, when they left, and were succeeded in the possession by Wood and Matthews, to whom also the premises were let by the plaintiff, and from whom he also received rent: these facts the defendants offered to establish by *parol proof*. The counsel for

the plaintiff objected that parol evidence of the alleged agreement or *surrender* of the lease was inadmissible; and also that the evidence, if intended to be urged in discharge of the covenants, ought not to be received, for the reason that a covenant cannot be discharged by parol *before* breach. The judge sustained the objection. The defendants then proved that Mills and Owen went into possession of the premises on the 1st November, 1831, and that previous to their entry, Edmund T. Carpenter (the tenant) put the premises in as good repair as they were in when he entered; they were thus repaired, because Mills and Owen were to take possession. The plaintiff, on being spoken to on the subject, said that he was satisfied with the repairs, if Mills and Owen were satisfied. It was also proved, that after Mills and Owen quit the premises, they were occupied by Wood and Matthews, who had a large number of men in their employment as laborers on a railroad and housed on the premises. Wood and Matthews were in possession six months, and paid rent to the plaintiff.

The counsel for the defendants insisted that the plaintiff was not entitled to recover in this action more than *nominal damages* for the breach of the covenant to keep the premises in repair, and for the injuries done to the premises, as the tenant might put the premises in complete repair before the end of the term, and if he did so the plaintiff would have no cause of complaint; if he did not do so, then the plaintiff would be entitled to bring his action, and to recover damages, and requested the judge so to charge the jury. The judge declined to do so, and, on the contrary, charged the jury that the plaintiff was entitled to his verdict for one quarter's rent, (which was admitted to be all that was due at the bringing of the suit;) and, further, that they were not bound to limit their verdict on the covenant of repairs to *nominal damages*, but might give such sum as, under all the circumstances, they should consider the plaintiff entitled to recover, provided they were satisfied that the defendants had violated their covenants. The jury found a verdict for the plaintiff with \$481.25 damages. The defendants ask for a new trial. The cause was submitted on written arguments.

E. Morrill and *S. Sherwood*, for the defendants.

C. O'Conner, for the plaintiff.

BY THE COURT. (NELSON, J.) This case has been elaborately argued upon paper by the respective counsel, and all the authorities and principles bearing upon the points disputed, have been referred to and examined; and were it not for some recent cases in the English courts, that are very confidently urged by the defendants' counsel, it seems to me there would be but little difficulty in disposing of the case. A surrender is defined to be a yielding up of an estate for life or years to him who hath the immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement. Comyn's Landlord and Tenant, 337; 2 Co. Lit. 551; 4 Cruise, 155; 4 Bacon's Abr. 209; Shep. Touch. 300, 307. Before the Statute of Frauds and Perjuries, any form of words without writing, whereby an intention

appeared to surrender up the possession of the premises to the lessor or reversioner, was sufficient for that purpose. This was called a surrender in *fact*. There was also a surrender in *law*. It was effected by the acceptance of a new lease of the premises from the lessor, for the whole or a part of the time embraced in the former one, because it necessarily implied a determination and surrender of that lease; otherwise the lessor would be unable to make the second, or the lessee to enjoy it, and it was therefore but reasonable to presume both parties intended to waive and relinquish the benefit of the first one. The second lease, before the Statute referred to, of course need not have been in writing to operate an effectual surrender of the first one. The Statute of 29 Car. enacted "that all leases, estates, interests of freehold or terms of years, or any uncertain interests of, in, to or out of any lands, &c., *made or created* by livery and seisin only, or by parol, and not put in writing, &c., shall have the force and effect of leases or estates at will only," &c., excepting leases not exceeding the term of three years from the making thereof. And also, "no leases, estates or interest either of freehold or term of years, or any uncertain interest, &c., of, in, to or out of any messuages, &c., shall be assigned, *granted or surrendered*, unless by deed or note, in writing, or *operation of law*." Our Statute (2 R. S. 184, § 6) provides that "no estate or interest in lands, other than leases for a term not exceeding one year, &c., shall hereafter be created, granted, assigned, *surrendered*, &c., unless *by act or operation of law*, or by deed or conveyance in writing," &c., § 8. "Every contract for the leasing for a longer period than one year, &c., shall be void," unless in writing. Since these Statutes, a parol lease in England for more than three years, and in this State for more than one, is entirely void; though if the tenant enters into possession, he shall be deemed a tenant at will, and for the purpose of notice to quit, from year to year, and notwithstanding the lease be void, it may regulate the terms of holding as to rent, time to quit, &c. 5 T. R. 471; Comyn's L. & T. 8; Woodf. 14, 15; 4 Cow. 350; 7 Id. 751. But as a lease for the purposes for which it was given, it is considered wholly void. It is, however, conclusively settled by authority, that the second lease must be a valid one, so as to convey, the interest it professes to convey, to the lessee, and also to bind him to the performance of the covenant or agreement in favor of the lessor, in order to operate as an effectual surrender of the first one. 3 Burr. 1807; 4 Id. 1980, 2210; 6 East, 86; Comyn's Dig. tit. Estate, G. 13; 4 Bac. Abr. 215. Without this, the reason before given for the *implied surrender* would fail, and the intent of the parties be altogether defeated. Instead of being but a surrender of the first lease, it would be a surrender of the whole estate and interest in the premises, and a virtual determination of the existence of any tenancy. Now the ground upon which the surrender in this case is mainly argued is, not that a new lease was given to the original lessee, but that it was given to Mills and Owen with his consent, for the period of eight or ten years. As-

suming this, amounts to the same as if given to Carpenter; it is impossible to maintain that any valid lease has been proved in the case, or any lease whatever for a definite period. The most that was offered to be proved was, that Mills and Owen went into possession with the consent of the defendants, under a parol agreement for a lease for eight or ten years; and if it be viewed as an agreement for a lease, or as a virtual lease for that time, it is void under the Statute, and could not be enforced by either of the parties. An implied tenancy at will only was created, which enabled Mills and Owen to hold from year to year, for the purpose of notice to quit, but which they could terminate at any moment they pleased. The agreement and entry in pursuance of it conferred no rights upon the plaintiff, further than to recover his rent while they continued to occupy, and perhaps a quarter's rent, if they abandoned the occupation after the commencement of a quarter and before its termination.

Suppose this agreement had been made with the original tenant, and the defendants can claim no more from it as offered to be proved, could it be contended that it operated as a virtual surrender of the lease for six years, and that the plaintiff could dispossess the tenant on giving six months' notice to quit? This would be the consequence of the doctrine urged in the defence. The tenant would become a mere tenant at will. The authorities already referred to clearly establish that the second lease, to have the effect claimed, must pass the interest in the premises according to the contract, or in other words, carry into legal effect the intent of the parties executing it. 3 Burr. 1807; 4 Id. 1980, 2210; Comyn's Dig. tit. Estate, 9, 12; 6 East, 661; 6 Wendell, 569; 1 Saund. 236, b. n. It is stated by Baron Gilbert, 4 Bacon's Abr. 210, that since the Statute of Frauds the new lease must be in writing in order to operate as an implied surrender of the old one, for it is then of equal notoriety with a surrender in writing. This position is also adopted by Serjeant Williams, in his notes upon the case of *Thursby v. Plant*, 1 Saund. 236, n. b. But as surrenders by operation of law are expressly excepted out of the Statute, as a necessary consequence they are left as at common law; and there it is clear it need not be in writing to have the effect to surrender the old one, even if by deed. 2 Starkie's Ev. 342; 20 Viner, 143, L. pl. 1, n.; 1 Saunders, 236, n. c. I am inclined therefore to think that a valid parol lease, since the Statute, might produce a surrender in law within the reason and principle upon which this doctrine is founded. The true rule seems to be that laid down by Mr. Starkie, 2 Starkie's Ev. 342, as follows: the taking a new lease by parol is by operation of law a surrender of the old one, although it be by deed, provided it be a good one, and pass an interest according to the contract and intention of the parties; for otherwise the acceptance of it is no implied surrender of the old one.

If the first lease in this case has not been surrendered, then there is no ground of defence against the action upon the express covenants contained in it, even if we should concede a legal assignment from the

tenant to Mills and Owen, and the acceptance of them expressly or impliedly by the plaintiff. 4 T. R. 98, 100; 1 Saund. 241, n. 5; Woodf. 278; Cro. Car. 188; Comyns's Land. and Tenant, 275, and cases there cited. But the plaintiff stipulated against assignment or underletting unless permission was given in writing, and a parol license is therefore inoperative. 2 T. R. 425; 3 Id. 590; 3 Madd. 218; Platt on Cov. 427. This clause in a lease would be nugatory, if courts should allow parol evidence to control in the matter. Besides, a parol *assignment* is void under the Statute of Frauds. The case of *Thomas v. Cook*, 2 Starkie's R. 408, is supposed to have a strong bearing upon this one. In that case there was a *parol lease* from year to year to Cook, who underlet to Parkes. The rent being in arrear, Thomas distrained upon him, and he paid it by a bill of exchange; on receiving which he declared he would have nothing more to do with Cook. Afterwards, however, he brought his action against him for rent then due. For the plaintiff it was insisted that there was no surrender within the Statute of Frauds. Abbott, C. J., left it to the jury to say, whether the plaintiff had not accepted Parkes as his tenant, with the assent of Cook; and the jury finding in the affirmative, the plaintiff was nonsuited. The court at the ensuing term, when the case was moved, were of opinion there was a surrender by operation of law. They say if a lessee assign and the lessor accept the assignee of the lessee as his tenant, *that* in point of law puts an end to the privity of estate, and an action of debt cannot be brought to recover the rent. That I admit to be true, but if the lease had been in writing, according to the cases above cited, a suit might still be maintained upon the *express covenant in it*, though the privity of estate was gone. Besides, the assignment was void as such under the Statute of Frauds. 1 Campb. 318; 5 Bing. 25; Comyn's Land. & Ten. 55, and cases there cited; Woodf. 277. Again, the court say it is a rule of law, that the acceptance of a subsequent lease by parol operates as a surrender of a former lease by deed. That is true under the circumstances we have before endeavored to explain, and is undoubtedly the legal ground upon which that case may be maintained. The case sufficiently shows that the implied parol demise to Parkes was a valid one to the extent intended by both parties; the one to Cook was a lease from year to year, and the acceptance of Parkes, as tenant in his place, impliedly gave him the same tenure and term; no writing was necessary for that purpose. This is the ground upon which the case is said to stand by the court, in commenting upon it in a subsequent term. 4 Barn. & Cres. 922.

In the case of *Grimman v. Legge*, 8 Barn. & Cres. 324, the lease was by parol for *one year*, for the first and second floor of a house; a dispute having arisen before the end of the year, the tenant said she would quit. The landlord said he would be glad to get rid of her. She accordingly left the premises, and possession was taken by him. The facts were submitted to the jury, to presume a rescindment of the original contract between the parties. The case of *Stone v. Whiting*,

2 Starkie, 235, is precisely like the case of *Thomas v. Cook*, and stands upon the same principle. In the case of *Whitehead v. Clifford*, 5 Taunt. 518, the lease was by parol from year to year, and stands upon the footing of *Grimman v. Legge*. In the case of *Hamerton v. Stead*, 3 Barn. & Cres. 478, a tenant from year to year entered into an agreement in writing for a lease to him and another, and from that time both occupied. It was held that the new agreement, coupled with the joint occupation, determined the former tenancy, and operated as a surrender in law, though the lease contracted for was never granted. If the new agreement and occupation were viewed as a tenancy from year to year, which was of equal tenure with the first lease, there was at least no hardship in this decision. The judges obviously were somewhat embarrassed in their endeavors to place the case upon principle, and some of their observations conflict with the case in 6 East, 86, which they admitted to be good law. The first case was by parol from year to year, and might well have been put upon the footing of the cases to which I have referred, where the facts were submitted to the jury to find the first contract rescinded.

The law seems to be well settled, that under a *covenant to repair* like the one in question, the landlord need not wait till the expiration of the term before bringing an action for the breach, under an idea that the tenant may, before he leaves the premises, put them in good condition. 1 Barn. & Ald. 584; 2 Ld. Raym. 803, 1125; 1 Salk. 141; Platt on Cov. 289; Comyn's Land. & Ten. 210. If the covenant was only to leave the premises in as good a condition as the tenant found them, it seems an action would not lie till the end of the term. Shep. Touch. 173; Platt on Cov. 289.

The defendants cannot question, in this action, the title of the landlord. The action is upon an express covenant between the parties, and the suit, if sustained at all, must be by the plaintiff alone.

New trial denied.

AUER v. PENN.

SUPREME COURT OF PENNSYLVANIA. 1882.

[Reported 99 Pa. 370.]

JANUARY 17th, 1882. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKY and STERRETT, JJ. GREEN, J., absent.

Error to the Court of Common Pleas, No. 1, of Philadelphia County: of July Term, 1881, No. 18.

Covenant, by Joseph Penn against John Auer, upon a contract of suretyship annexed to a lease. Upon a former writ of error, a judgment entered for plaintiff for want of a sufficient affidavit of defence was reversed, and a *procedendo* awarded: see 11 Norris, 444.

On the trial, before *Biddle*, J., the following facts appeared: On October 15th, 1875, the plaintiff leased a certain house to one Jacob Brown, for the term of five years, at the yearly rent of \$360, payable in equal monthly payments of \$30 each. The lease contained the usual covenants on the part of the lessee to pay the rent as due, &c. At the foot of the lease was the agreement of suretyship, signed and sealed by the defendant, John Auer, whereby he covenanted that the lessee should faithfully perform all the covenants in the lease on his part to be performed, otherwise immediate recourse may be had against the surety without any prior proceedings against the lessee.

The lessee entered, paid his rent regularly to January, 1877, and moved out, without notice to his landlord, on February 13th, 1877, because, as he alleged, of defective drainage; after removal he took the keys to the landlord's agent, J. McGeogh. McGeogh testified that he declined to receive them, and stated that he would hold his surety for the rent, whereupon Brown threw them on the floor and went out. Brown testified that McGeogh took the keys, saying it was all right, but he admitted that McGeogh said he would hold John Auer, the surety, for the rent.

McGeogh sent to Auer the following letters on the days of their date.

PHILADELPHIA, February 17th, 1877.

Office 2228 North Fifth Street.

JOHN AUER, Esq. Dear Sir: The rent of No. 1836 Germantown Avenue was due on the 15th instant, and I would like you would call up and pay it. Brown, the tenant for whom you are security, having removed, of course we will have to hold you for the rent.

Yours respectfully,

J. McGEOGH.

February 21st, 1877.

JOHN AUER, Esq. Dear Sir: The tenant of 1836 Germantown Avenue having removed, and as under the lease you are security, I shall look to you for the payment of the rent. If you desire it, I shall place a bill on the house and rent it for you; but in no case will we release you until the expiration of the lease. You will take notice that unless I hear from you in this matter within a few days, I shall proceed to rent the house at your risk, holding you, of course, for the rent until the expiration of the lease.

Yours, respectfully,

JAMES McGEOGH,

Agent for Jos. Penn, 2228 North Fifth Street.

February 23d, 1877.

JOHN AUER, Esq. Dear Sir: If I do not hear from you to-day, I shall put a bill on the property 1836 Germantown Avenue to-morrow, still holding you, as before stated, for rent until the expiration of the lease.

Yours, respectfully,

J. McGEOGH, Agent for Joseph Penn.

PHILADELPHIA, March 1st, 1877.

JOHN AUER, Esq. Dear Sir: A party named Frederick Metzger is desirous of renting 1836 Germantown Avenue; he is willing to pay thirty dollars per month. If you have any objection, please let me know. If I do not hear from you by to-morrow morning, I will rent it to him, and still hold you as security.

Yours, respectfully,
JAS. MCGEOGH, Agent for Joseph Penn.

PHILADELPHIA, September 15th, 1877.

JOHN AUER, Esq. Dear Sir: Frederick Metzger, present occupant of 1836 Germantown Avenue, is removing. John Riehl, a former occupant of the place, desires to rent it. Unless I hear from you to the contrary, I shall rent it to him, still holding you, of course, for the rent as security on the lease.

Yours, respectfully,
JAMES MCGEOGH,
Agent for Joseph Penn, 2228 North Fifth Street.

January 2d, 1878.

JOHN AUER, Esq. Dear Sir: Store 1836 Germantown Avenue is again vacant; there is a party named Sylvester Kreider who wishes to rent it as a barber-shop. If you have no objections I will rent it to him, still holding you, of course, as security under the lease.

Yours, respectfully,
J. MCGEOGH,
Agent for Joseph Penn, No. 2228 North Fifth Street.

January 21st, 1878.

JOHN AUER, Esq. Dear Sir: Premises 1836 Germantown Avenue being idle, I shall put a bill on the same, to rent, unless I hear from you to the contrary, holding you, of course, as security under the lease.

Yours, respectfully,
J. MCGEOGH, 2228 North Fifth Street.

May 13th, 1878.

JOHN AUER, Esq. Dear Sir: There is a party named William Piersons, who desires to rent the house 1836 Germantown Avenue, for a saloon. I cannot get any more than \$25. If I do not hear from you by to-morrow morning I shall rent it, holding you, of course, under the lease as security.

Yours, respectfully,
J. MCGEOGH, 2228 North Fifth Street.

No answers were received to these communications. McGeogh rented the premises to various tenants from time to time, credited the lessee with the rents received from them, leaving a balance due, at the expiration of the term, of \$355, for which this suit was brought.

The defendant presented the following points: —

1. "That if the jury find that the premises leased were unhealthy and untenable by reason of impure air, arising from defective drainage, which existed when the lease was made; that this fact was known to the plaintiff, and he refused to remedy the defect, and that the tenant removed in consequence thereof, the plaintiff cannot recover in this suit. The tenant is not bound to repair defects existing when he leases the premises."

Answer. "I was going to say that that is a proposition of law, which it does not seem to me necessary to answer, in one way or another, here, because there is no testimony to that effect; on the contrary, the testimony on both sides has been that the house was perfectly satisfactory at the time it was leased, that Mr. Brown lived in it about a year afterwards. I do not think the state of facts arises here which makes it necessary for me to answer the point."

2. "If the landlord took possession of the premises, and used or occupied the same, either personally or by a second tenant, he will be estopped from collecting the rent for the same period of the former tenant, unless otherwise agreed between them."

Answer. "The phraseology there is a little ambiguous. 'If the landlord took possession of the premises.' If that means that if the landlord accepted the surrender of the premises and agreed to release the tenant, the proposition is true; but the mere fact, as I have said to you, of the landlord's taking possession of the premises and renting them, after the other party had refused to remain upon them, does not produce the effect that is here asked for. If that is the meaning of the point, I refuse to affirm it."

The learned judge charged the jury, *inter alia*, as follows: "The rule of law is perfectly well settled in this State, that a landlord is not liable for repairs unless there is a special stipulation to that effect in the lease. Any man has a right to take the premises of any other man if he pleases, making any covenant or agreement with the landlord that he pleases, but it is settled that he cannot withhold the payment of the rent on account of the bad condition of the premises.

"The second point that he makes is, that he surrendered possession of these premises. A contract to lease a house, or a contract to take a house, is like any other agreement. After you have made it, one party has no right to put an end to it. No man, after you have made an agreement or contract with him, can come to you and say, 'I will give up this contract.' Unless both parties assent to the giving up of the contract, the contract cannot be broken in that way. Undoubtedly, if the landlord and tenant come together, and a landlord agrees to accept a surrender of the premises, that would end the lease and responsibility of the tenant; but a tenant has no right to go into a landlord's office and say, 'I have done with the house,' and throw the key on the floor of the landlord's office. The landlord is not bound to let the key remain on the floor; he has a perfect right to hang it upon a nail without it being evidence that he accepts the surrender. . . . On the

contrary, he says, 'I will hold your surety responsible.' It does not constitute a surrender or an acceptance by the landlord that he takes possession of the property and looks after it, and rents it, because that is for the benefit of both parties.

"[If a man refuse to continue your tenant, gives up the house into your hands, why then you have a right to put a bill upon the house, and try to rent it, because if you rent it, it is so much saved to Mr. Auer, so much saved to the surety, or the tenant, because you have to give an account of every cent you make out of the house, and certainly it is much better for the tenant that the landlord should rent the house and get something for it than to simply lock the door, and lay by and sue the tenant or the surety for the whole amount of the rent for the whole term for which he has taken it, so that, being for the benefit of both parties, it is no presumption that the landlord has accepted a surrender that he has taken and leased the house.]

"[In regard to the leasing in the name of Mr. Penn, I see no pertinence in that, one way or the other. I do not see what right he would have to use Mr. Auer's name as landlord any more than he had to use the name of any one of us, and rent any property for us. He did the best — he was bound to do the best he could for the property — it was quite immaterial under whose name he rented it.]"

Verdict and judgment for the plaintiff, for the amount claimed. The defendant took this writ of error, assigning for error the answers of the court to his points, and the portion of the charge above quoted in brackets.

M. Arnold (Wm. W. Ker with him), for the plaintiff in error.

Wm. Gorman, for the defendant in error.

MR. JUSTICE FAXSON delivered the opinion of the court, February 13th, 1882.

Nothing is better settled in Pennsylvania than that a tenant for years cannot relieve himself from his liability under his covenant to pay rent by vacating the demised premises during the term, and sending the key to his landlord. The reason for it is that in the absence of fraud, one party to a contract cannot rescind it at pleasure. And the landlord may accept the keys, take possession, put a bill on the house for rent, and at the same time apprise his tenant that he still holds him liable for the rent. All this, as was said by Mr. Justice Rogers in *Marseilles v. Kerr*, 6 Wharton, 500, is for the benefit of the tenant, and is not intended, nor can it have the effect, to put an end to the contract and discharge him from rent. A surrender, a release, or an eviction will undoubtedly relieve a tenant, and it was said by Chief Justice Gibson, in *Fisher v. Milliken*, 8 Barr, 111, that nothing less would do so. This remark, however, was without the authority of the court, and must be regarded as *dictum*. The case in hand does not require us to assert so broad a proposition. There was neither a release nor an eviction here, but the surety claimed to be discharged because after the tenant, who was his principal, sent the keys to the landlord, the latter leased

the property to another tenant. Yet there is no pretence that the landlord accepted a surrender; on the contrary, the proof is clear that he declined to do so, and notified the defendant below that he would hold him for the rent. This notice was repeated on more than one occasion when he was about to lease the property to another tenant. Yet it was urged by the defendant below that such subsequent leasing by the landlord, and the acceptance of rent from the tenant, raised a presumption of a surrender. A surrender of demised premises by the tenant during the term, to be effectual, must be accepted by the lessor. The burden of proof is upon the tenant to show such acceptance. He sets it up to relieve himself from his covenant, and must prove it. When, therefore, the lessor retains the keys, and at the same time notifies the lessee that he will hold him for the rent, there is no room for the presumption of a surrender. Nor does the renting of the premises to another tenant under such circumstances raise such presumption, for the reason that it is manifestly to the lessee's interest that they should be occupied. The landlord may allow the property to stand idle, and hold the tenant for the entire rent; or he may lease it and hold him for the difference, if any. It was said in *Breuckmann v. Twibill*, 8 Norris, 58, that "taking possession, repairing, advertising the house to rent, are all acts in the interest and for the benefit of the tenant, and do not discharge him from his covenant to pay rent." Much more is it to the interest of the tenant for the landlord to rent the premises. If at the same rent, the tenant is entirely relieved; if at less, he is liable only for the difference.

Upon the trial in the court below, the learned judge instructed the jury, as set forth in the second assignment of error, as follows: "If a man refuses to continue your tenant, gives up the house into your hands, why, then, you have a right to put a bill upon the house and try to rent it; because, if you rent it, it is so much saved to Mr. Auer, so much saved to the surety of the tenant, because you have to give an account of every cent you make out of the house; and certainly it is much better for the tenant, that the landlord should rent the house and get something for it, than to simply lock the door and lay by and sue the tenant or surety for the whole amount of the rent for the whole term for which he has taken it; so that, being for the benefit of both parties, it is no presumption that the landlord has accepted a surrender, that he has taken and leased the house."

We see no error in this. It is good sense as well as good law.

We are not aware of any authorities in this State which are in conflict with the foregoing views. Those cited on behalf of the defendant below certainly are not.

The remaining assignments do not require discussion. The fifth does not fully state the ruling of the court below. As it appears in the bill of exceptions it is entirely correct.

*Judgment affirmed.*¹

¹ *Brown v. Cairns*, 107 Iowa 727 (1896); *Brown v. Cairns*, 63 Kan. 584 (1901), accord.

DECKER v. HARTSHORN.

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1897.

[Reported 60 N. J. L. 548.]

ON error to the Supreme Court.

For the plaintiffs in error, *Norman Grey*.For the defendant in error, *Henry M. Snyder, Jr.*

The opinion of the court was delivered by

GUMMERE, J. This was an action brought by the plaintiffs in error, who were the plaintiffs below, to recover from the defendant (trading as Louis Pelouze & Company) rent for certain premises in the city of Philadelphia, which had been leased to him by them. The rent sought to be recovered was claimed to have accrued from February 4th, 1893, to April 3d, 1894. The defence was that the defendant had ceased to be a tenant before the first-mentioned date.

The only assignment of error which requires consideration in the disposition of the case is that which challenges the correctness of the ruling of the trial judge in refusing to direct a verdict for the plaintiffs.

The situation at the close of the testimony was this: The plaintiffs having proved the existence of a tenancy, the defendant sought to show that there had been a surrender of his estate in the demised premises, by act and operation of law, prior to February 4th, 1893. The evidence produced by him in support of this defence was as follows: On November 1st, 1892, the defendant delivered up the possession of the premises to the American Type Founders Company, who thereafter carried on business there as Louis Pelouze & Company, the same name as that used by the defendant in conducting his business there. On November 28th he notified the agent of the plaintiffs of that fact in a letter sent to their agent, which reads as follows:

"*Mr. Gailey:*

"Dear Sir—Enclosed we hand you check for one hundred and twenty-three dollars and fifty-two cents, rent in full to November 1st, 1892. As this foundry became possessed by the American Type Founders Company on November 1st, 1892, we square up our account to that date, which we trust is satisfactory. Kindly acknowledge receipt in full to November 1st, 1892.

"Respectfully,

"LOUIS PELOUZE & Co."

To this letter Mr. Gailey sent the following reply to the defendant November 29th, 1892:

"*Mess. L. Pelouze & Co.:*

"GENTLEMEN—Your favor of yesterday, with check for \$123.52, in settlement of rent to November 1st, duly received. Please accept

thanks for same and inclosed find receipt. If you wish the rent hereafter to fall due on the first day of each month it will necessitate a new lease, which I will prepare and take to you for execution, unless you advise me that you wish the rent to become due as heretofore on the 4th.

"Yours truly,

"S. M. GALEY."

On the 13th of January, 1893, a check of the American Type Founders Company, for the rent due January 1st, was sent to the plaintiffs' agent in a letter signed "Louis Pelouze & Co." This letter was in the handwriting of the defendant, but he testifies that when he wrote it he was in the employ of the American Type Founders Company and was acting for them. The check was accepted by the plaintiffs' agent in payment of the rent for which it was sent, and the money drawn thereon by him.

This is the whole of the evidence, from which it is insisted, on behalf of the defendant, that a surrender of his estate in the demised premises can be implied. Are these facts sufficient to warrant the implication?

The case most favorable to the contention of the defendant, so far as my examination of the books has disclosed, is *Thomas v. Cooke*, 2 Barn. & Ald. 119, in which it was held that a surrender in law could be implied where a lessee had put a third person in possession of the demised premises and the lessor had, with the lessee's assent, accepted such third person as his tenant. This case has been followed, to some extent, both in England and in this country, but has, notwithstanding, been frequently doubted. Baron Parke, in *Lyon v. Reed*, 13 Mees. & W. 285, 309, in discussing that decision, says: "It is a matter of great regret that a case involving so much importance and nicety, should have been decided by refusing a motion for a new trial. Had the case been put into a train for more solemn argument, we cannot but think that many considerations might have been suggested, which would have led the court to pause before they came to the decision at which they arrived." "We feel fully warranted in not extending the doctrine of that case, which is open to so much doubt, especially as such a course might be attended with very mischievous consequences to the security of titles." In our own state, also, Chief Justice Beasley, commenting on the same case, in *Hunt v. Gardner*, 10 Vroom, 583, says: "I think it may be safely said, that to hold that a surrender in law will be implied, or raised up, from the facts that a tenant has put a third person in possession of the demised premises, and that such third person has been accepted as tenant, with the assent of the original tenant, is carrying the principle to the verge of mischief to titles by leasehold."

Whether, in view of the injurious criticism to which the case has been subjected by such eminent jurists, the doctrine established by

Thomas v. Cooke should be followed in this state, is a question which, it seems to me, ought not to be determined except after very careful consideration, and the case before us, as I view it, does not call for a determination of that question. In Thomas v. Cooke, the person who was put in possession of the demised premises by the lessee was afterward accepted as tenant by the lessor; in the present case that element is wanting. There is nothing in the letter written by the agent of the plaintiffs on November 29th which can be construed into an acceptance of the Type Founders Company as tenant. On the contrary, it clearly appears from it that the agent still considered the defendant to be the tenant of his principals, notwithstanding the change in the possession of the demised premises. So, too, although it appears from the proofs that, after possession of the premises had been delivered by the defendant to the Type Founders Company, the latter paid rent to the plaintiffs, yet such payment was made by the company in the name of Louis Pelouze & Company, the name previously used by the defendant; and there is no evidence to warrant the conclusion that, when this payment was made to and accepted by the plaintiffs, they had any knowledge that "Louis Pelouze and Company" was no longer Henry L. Hartshorn, the defendant, but had become the American Type Founders Company. But even if the fact had been otherwise—if the plaintiffs had known that the rent was paid by the Type Founders Company and had accepted it with that knowledge—the result would have been the same so far as this case is concerned. The mere receipt of rent by the landlord from an under-lessee does not evidence his assent to the abandonment of the premises by the original lessee, and is no proof of his acceptance of such under-lessee as tenant. *Bacon v. Brown*, 9 Conn. 334; *Tayl. Land. & T.* § 512; *Copeland v. Watts*, 1 Stark. 76.

In my opinion, taking the most favorable view of the facts proved in this case, and of the law applicable to those facts, they will not support a finding that there was a surrender of the estate of the defendant in the demised premises by act and operation of law prior to the commencement of the period for which rent is claimed by the plaintiffs. The request of the plaintiffs, therefore, that the jury should be directed to render a verdict in their favor was improperly refused, and for this reason the judgment below should be reversed.

For affirmance—None.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, COLLINS, DEPUE, DIXON, GUMMERE, LIPPINCOTT, LUDLOW, VAN SYCKEL, BOGERT, HENDRICKSON, NIXON. 12.

GRAY v. KAUFMAN DAIRY AND ICE CREAM COMPANY.

COURT OF APPEALS OF NEW YORK. 1900.

[Reported 162 N. Y. 388.]

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 5, 1897, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term, a jury having been waived.

This action was brought to recover two months' rent of the premises known as No. 787 Eighth avenue, in the city of New York. In July, 1893, the plaintiff let the said premises to the defendant for ten years from August 1st, 1893, at the yearly rental of \$2,400, payable monthly in advance, and also the extra water rent charged against the defendant for its business. The defendant took possession about July, 1893, and paid rent to November 1st, 1893, but refused to pay for the months of November and December of that year, the rent of which became due and payable on the first days of those months respectively.

The answer, in effect, admits the making of the lease, but denies any indebtedness under it and sets up the eviction of the defendant, a surrender and rescission of the lease, and claims credit for the rent received from the undertenant. On or about the 28th or 29th of October, 1893, the plaintiff had a conversation with Mr. Kaufman, the president of the defendant, upon the demised premises. The plaintiff's version of this conversation is as follows: "They were pulling up the store and the things, and were going to move out. They had not said anything to me about moving out prior to that time. I asked Mr. Kaufman what he was doing, pulling up the store. He said he was going to move out, and I asked him why, and he said because he couldn't make any money, and I told him that he had a lease on it, and that I would hold him responsible for the rent if he went out. 'Well,' he says, 'I am moving out, I don't want to stay where I don't make my rent.'" The defendant moved out and sent the keys of the store to the plaintiff by mail. Plaintiff received them about the 2nd of November, 1893. On the 3d of November, 1893, plaintiff served upon the defendant a notice of which the following is a copy:

"NEW YORK, November 3d, 1893.

"*To the Kaufman Dairy & Ice Cream Co.:*

"Yesterday I received the keys of 787 Eighth Avenue by mail. I hereby notify you that I do not accept a surrender of the premises, and that I intend to hold you responsible for the rent under the lease. I shall let the premises on your account, and hold you for any loss which may be sustained.

"Yours, etc.,

"JOHN GRAY."

The defendant made no answer to this notice. On the 17th of November, 1893, the plaintiff went to Kingston and saw Mr. Kaufman, the president of the defendant, Mr. Spore, the secretary, and a Mr. Bruin. The plaintiff asked Mr. Kaufman for the November rent, and the latter replied that no rent was due; that he had not made a lease; that there was nothing due and he would not pay; that he had given up the store and plaintiff could do what he liked with it. Thereupon the plaintiff started for home. The president and secretary of the defendant went to the railway station and there had a conversation with the plaintiff about compromising the matter by taking the cellar of said premises for fifty dollars a month for the term of the lease if the plaintiff would cancel the same as to the rest of the premises. The plaintiff said he would think over the matter and see what he could do with the remainder of the property, and let them know. The plaintiff testifies that thereafter, and on the 27th of November, 1893, he wrote to the defendant as follows:

"KAUFMAN DAIRY & ICE CREAM Co.:

"GENTLEMEN. — I have an offer for the store you leased from me, 797 Eighth Ave. The parties will pay \$1,500 to the first of May and \$1,600 for three years from May. I think this is about as good an offer as can be expected, considering the times. Please let me know if you will keep the cellar and pay the difference between the \$1,500 and \$2,400 to May, and \$1,600 — \$2,400 after. An early reply will much oblige.

Yours respect.

J. GRAY,

"323 Washington Ave."

The plaintiff further testifies that he enclosed this letter in an envelope directed to the defendant at Kingston, N. Y., deposited it prepaid in the post office at Brooklyn and received no reply thereto. The defendant had tenants in the cellar when it left the premises. These tenants attorned to the plaintiff.

On or about the 1st of December, 1893, plaintiff let the premises which had been previously demised to the defendant to one Mary Ann Keogh for the term of three years and five months at an annual rental of \$1,500 per year for the first five months, and \$1,600 per year for the remaining three years, to be paid in equal monthly installments in advance.

The defendant pleaded eviction, but gave no evidence upon that subject, and upon the trial admitted that it had no excuse for leaving the premises. Kaufman admitted having a conversation with the plaintiff before the defendant left the premises, in which the plaintiff stated that he would hold the defendant for the rent, but denied that he, Kaufman, had stated that the defendant would not stay where it did not make any money. Kaufman also admitted the receipt of the letter dated November 3d, but both he and Spore denied receiving the one dated November 27th. Both admitted the conversation testi-

fied to by the plaintiff as having taken place at Kingston, and Spore testified that on that occasion Kaufman stated distinctly that the defendant did not owe any rent; that it had given up and surrendered the premises; that there was some talk at the railroad station about renting the cellar from the plaintiff at fifty dollars per month during the term of the lease, but there was nothing said in that conversation about plaintiff's reletting the premises on defendant's account. Abraham L. Gray, a son of the plaintiff, testified on the latter's behalf that he went to Kingston with his father to see Kaufman and was present at the conversation at the railroad station. He testified that Mr. Spore offered the plaintiff fifty dollars a month for the basement if he would let the defendant off on the store, and the plaintiff replied that he would think it over and let them know. The lease to the defendant contained no provision against subletting, except for "any saloon or liquor business," and contained no provision for a reletting of the premises by the plaintiff in case the defendant vacated the same during the term of the lease.

After the evidence was all in, the parties waived the jury and submitted the facts to the court for decision. The defendant admitted its liability for the November rent, but claimed that it was released as to the December rent by the reletting of the premises to said Mary Ann Keogh on the 1st of December. Upon these facts the court found that the plaintiff was entitled to recover rent for the months of November and December, less the amount received from the under-tenants; that the plaintiff refused to accept a surrender of the premises; that the premises were at no time surrendered to the plaintiff, and that the reletting of the premises was done with the assent of the defendant.

David B. Hill, for appellant.

Jacob F. Miller, for respondent.

WERNER, J. This controversy arises out of the conventional relation of landlord and tenant under circumstances governed by fixed principles of law. The first and most important question in the case is whether the plaintiff's reletting of the premises described in the lease, after the defendant's attempted surrender of the same, changed or affected the legal status of the parties under the original lease. It is so well settled as to be almost axiomatic that a surrender of premises is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made. It has been held in this state that "a surrender is implied, and so effected by operation of law within the statute, when another estate is created by the reversioner or remainderman with the assent of the termor incompatible with the existing state or term." *Coe v. Hobby*, 72 N. Y. 145. The existence of this rule has been recognized in this state in *Bedford v. Terhune*, 30 N. Y. 463, *Smith v. Kerr*, 108 N. Y. 86, *Underhill v. Collins*, 132 N. Y. 271, and in other juris-

dictions in *Beall v. White*, 94 U. S. 889, *Amory v. Kannoffsky*, 117 Mass. 351, *Thomas v. Cook*, 2 Barn. & Ald. 119, *Nickells v. Atherton*, 10 Ad. & El. N. R. 944, *Lyon v. Reed*, 18 M. & W. 306, and Washburn on Real Property, Vol. I., pp. 477, 478. It is conceded that defendant's offer of surrender was declined by the plaintiff, and that after the defendant's abandonment of the premises the plaintiff relet the same in his own name to one Mary Ann Keogh for a term of three years and five months. Such a situation, unqualified by other conditions, would create a surrender by operation of law. We must, therefore, ascertain whether the conduct of the parties takes this case out of the operation of this rule.

It is urged by the learned counsel for the plaintiff that the reletting was done with the consent of the defendant under circumstances which bring the case directly within the rule laid down by Judge HAUGHT in *Underhill v. Collins*, 132 N. Y. 270. In that case the landlord and tenant had a conversation a few days before the latter vacated the premises. The tenant asked the landlord to take the same off his hands. This the landlord declined to do, insisting that he would hold the tenant for the rent and would lease the premises for his benefit. In the case at bar there was also a conversation before the premises were vacated; but in this conversation there was nothing said about a reletting. The plaintiff simply said that he would hold the defendant for the rent. On the 2d of November, 1893, a day or two after defendant's removal, the plaintiff received the keys of the premises. He returned them with a note stating that he would relet on defendant's account and hold it responsible for any loss that may be sustained. To this note the defendant made no reply. On the 17th of November, 1893, the plaintiff and his son went to Kingston and saw Kaufman and Spore. In the conversation which took place between them and the plaintiff there was no suggestion of reletting. The plaintiff made a demand for the rent which was unpaid, and the defendant made an offer of compromise, under which it agreed to take the cellar of said premises at fifty dollars per month if the plaintiff would cancel the lease as to the store. This offer the plaintiff agreed to consider. On the 27th of November, 1893, the plaintiff wrote to the defendant that he had an offer for the store of \$1,500 per year to the first of the next ensuing May, and \$1,600 per year for three years thereafter. He requested the defendant to let him know if it would keep the cellar and pay the difference between the rent fixed by the lease and the amount offered by the intending tenant. To this letter the defendant made no reply. It will be observed from this brief *resumé* of the facts that there are several distinct features in which this case differs from the Underhill case. In the latter case there was a personal interview before the tenant had vacated, in which the subject of reletting the premises was discussed. Here the subject of reletting was not mentioned until after the tenant went out, and then the suggestion came in a letter to which the defendant made

no reply. Obviously the only theory upon which defendant can be held to have assented to the reletting of the premises is that by its silence it acquiesced in the act of the plaintiff. We may assume, although we do not decide, that if the communications upon the subject of reletting had been made verbally in the course of conversation between the parties, even after the tenant had vacated the premises, the rule as to agreements by implication laid down in the Underhill case might be held to apply. But here, as we have seen, the landlord's proposal to relet was in the form of two letters. In the first of these, dated November 8d, he makes the unequivocal assertion that he will let the premises on defendant's account, and will hold it for any loss that may be sustained. Defendant's failure to reply to this letter is followed by a personal interview on the 17th of November, in which there is no reference to a reletting of the premises, and in which defendant's president, after denying any liability for rent, tells the plaintiff to do what he likes with the premises. Then follows the letter of November 27th, informing the defendant of the offer which the plaintiff had received from an intending tenant, and asking defendant if it would pay the difference between the amount offered and the rent reserved in the original lease. It will be observed that, even if we were to give these written communications the same force and effect as verbal statements made in personal interviews between the parties, the facts here are easily differentiated from those in the Underhill case. There the tenant vacated the premises upon the offer of the landlord to relet for his benefit and under such circumstances as to permit the inference that he accepted the offer. Here the landlord's statement to that effect, made after the tenant's abandonment of the premises, is followed by negotiations in which the tenant expresses a willingness to keep the cellar at fifty dollars per month if the landlord will cancel the lease as to the rest of the premises. These steps are succeeded by a communication from the landlord, in which he requests the tenant to decide whether it will keep the cellar and pay the deficit which will arise by an acceptance of the offer which the former then had under consideration. It may well be doubted whether verbal declarations made in personal interviews between the parties, under the circumstances above narrated, would support the plaintiff's theory of this action. To create a contract by implication there must be an unequivocal and unqualified assertion of a right by one of the parties, and such silence by the other as to support the legal inference of his acquiescence. But it is clear, both upon principle and authority, that we have no right to indulge in the assumption that the letters above referred to have the force and effect of verbal statements made in the presence of the defendant's officers. The rule is precisely to the contrary. It is well expressed in *Learned v. Tillotson*, 97 N. Y. 12, as follows: "We think that a distinction exists between the effect to be given to oral declarations made by one party to another, which are in answer to or contradictory of some statement made by the other

party, and a written statement in a letter written by such party to another. It may well be that under most circumstances what is said to a man to his face, which conveys the idea of an obligation upon his part to the person addressing him, or on whose behalf the statement is made, he is at least in some measure called upon to contradict or explain; but a failure to answer a letter is entirely different, and there is no rule of law which requires a person to enter into a correspondence with another in reference to a matter in dispute between them, or which holds that silence should be regarded as an admission against the party to whom the letter is addressed. Such a rule would enable one party to obtain an advantage over another and has no sanction in the law." To the same effect are *Bank of B. N. A. v. Delafeld*, 126 N. Y. 418, and *Thomas v. Gage*, 141 N. Y. 506.

It is manifest, therefore, that the act of the plaintiff in reletting said premises under the circumstances referred to operated as an acceptance of the defendant's offer to surrender. The judgment herein can be supported upon no theory that is consistent with the established rules of law. As the views above expressed are decisive of the case, it is unnecessary to discuss the other questions raised by the defendant.

The judgment of the court below should be reversed and a new trial granted, with costs to abide the event.

LONDON, J. (dissenting). The trial court found as facts that "Plaintiff refused to accept a surrender of the premises, and did not accept it, and the premises were at no time surrendered to the plaintiff. The letting of the premises was done with the assent of the defendant." The order of affirmance by the Appellate Division does not state that it was unanimous, but that is not important here, for the record contains evidence tending to support the findings. The evidence tends to show that the defendant intended by its conduct to threaten the plaintiff with the loss of his rent, and thus to coerce him to relet the premises, and then deny its assent, notwithstanding after its receipt of the plaintiff's first letter, it told the plaintiff he could do as he liked with the premises. The defendant thus replied to the plaintiff's letter, at least so the trial court, in view of all the circumstances, might find, and did find.

PARKER, Ch. J., GRAY, O'BRIEN and HAIGHT, JJ., concur with WERNER, J., for reversal; LONDON, J., reads dissenting memorandum; CULLEN, J., not sitting.

Judgment reversed, etc.

NOTE. — "If, owing to some rule of law, a deed fail to take effect in the manner intended, it will, if possible, be construed so as to take effect in some other manner which will carry the expressed general intention of the parties into effect." Elphinstone, Deeds, 40. A case illustrating this important rule is *Roe v. Tranmer*, 2 Wils. 76; 1 Gray, Cas. on Prop. (2d ed.) 391. See also cases collected, Elphinstone, *loc. cit.*; *Eckman v. Eckman*, 68 Pa. 460, 470 (1871); *Carr v. Richardson*, 157 Mass. 576 (1893); *Rogers v. Sisters of Charity*, 97 Md. 560 (1903).

EXCHANGE. LIT. § 62. And in some case a man shall have by the grant of another a fee simple, fee tail, or freehold without livery of seisin. As if there be two men, and each of them is seised of one quantity of land in one county, and the one granteth his land to the other in exchange for the land which the other hath, and in like manner the other granteth his land to the first grantor in exchange for the land which the first grantor hath; in this case each may enter into the other's land, so put in exchange, without any livery of seisin; and such exchange made by parol of tenements within the same county without writing is good enough.

LIT. § 63. And if the lands or tenements be in divers counties, viz., that which the one hath in one county, and that which the other hath in another county, there it behooveth to have a deed indented made between them of this exchange.

LIT. § 64. And note, that in exchanges it behooveth, that the estates which both parties have in the lands so exchanged, be equal; for if the one willeth and grant that the other shall have his land in fee tail for the land which he hath of the grant of the other in fee simple, although that the other agree to this, yet this exchange is void, because the estates be not equal.

LIT. § 65. In the same manner it is, where it is granted and agreed between them, that the one shall have in the one land fee tail, and the other in the other land but for term of life; or if the one shall have in the one land fee tail general, and the other in the other land fee tail especial, &c. So always it behooveth that in exchange the estates of both parties be equal, viz., if the one hath a fee simple in the one land, that the other shall have like estate in the other land; and if the one hath fee tail in the one land, the other ought to have the like estate in the other land, &c., and so of other estates. But it is nothing to charge of the equal value of the lands; for albeit that the land of the one be of a far greater value than the land of the other, this is nothing to the purpose, so as the estates made by the exchange be equal. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c., and in each of their grants mention shall be made of the exchange.

Co. LIT. 51 b. To shut up this point, there be five things necessary to the perfection of an exchange. 1. That the estates given be equal. 2. That this word (*excambium*, exchange) be used, which is so individually requisite, as it cannot be supplied by any other word, or described by any circumlocution: and herewith agreeth Littleton afterwards in this section. In the book of Domesday I find, "*Hanc terram cambiavit Hugo Briccuno quod modo tenet comes Meriton, et ipsum scam-bium valet duplum.*"

"Hugo de Belcamp pro escambio de Warres."

3. That there be an execution by entry or claim in the life of the parties, as hath been said. 4. That if it be of things that lie in grant, it must be by deed. 5. If the lands be in several counties, there ought to be a deed indented, or if the thing lie in grant, albeit they be in one county.

PERK. § 265. If an exchange be made between me and T. K., viz., that after the feast of Christmas, he shall have my manor of Dale, in exchange for his manor of Sale, &c., it is a good exchange; and each of us may enter into the other's manor, after Christmas, &c.

The Statute of Frauds, Statute 29 Car. II. c. 3 (1677), made void all estates not created by writing; and the Statute 8 & 9 Vict. c. 106, § 8 (1845), required exchanges to be by deed.

For a long time past exchanges have been little, if at all, used. See *Windsor v. Collinson*, 32 Or. 297 (1898).

PARTITION. This will be dealt with in a later volume, in connection with joint interests.

FORM OF CONVEYANCE. LIT. § 370. And for that such conditions are most commonly put and specified in deeds indented, somewhat shall be here said (to thee, my son) of an indenture and of a deed poll concerning conditions. And it is to be understood, that if the indenture be bipartite, or tripartite, or quadripartite, all the parts of the indenture are but one deed in law, and every part of the indenture is of as great force and effect as all the parts together be.

Co. Lit. 229 a. "In deeds indented." Those are called by several names, as *scriptum indentatum*, *carta indentata*, *scriptura indentata*, *indentura*, *litteras indentata*. An indenture is a writing containing a conveyance, bargain, contract, covenants, or agreements between two or more, and is indented in the top or side answerable to another that likewise comprehendeth the selfsame matter, and is called an indenture, for that it is so indented, and is called in Greek *σὺργαφον*.

If a deed beginneth, *hac indentura*, &c., and in troth the parchment or paper is not indented, this is no indenture, because words cannot make it indented. But if the deed be actually indented, and there be no words of indenture in the deed, yet it is an indenture in law; for it may be an indenture without words, but not by words without indenting.

"In deeds indented." And here it is to be understood, that it ought to be in parchment or in paper. For if a writing be made upon a piece of wood, or upon a piece of linen, or in the bark of a tree, or on a stone, or the like, &c., and the same be sealed or delivered, yet it is no deed, for a deed must be written either in parchment or paper, as before is said, for the writing upon these is least subject to alteration or corruption.

"If the indenture be bipartite, or tripartite, or quadripartite, &c." "Bipartite" is, when there be two parts and two parties to the deed. "Tripartite," when there are three parts and three parties; and so of "quadripartite," "quintepartite," &c.

"And of a deed poll." A deed poll is that which is plain without any indenting, so called because it is cut even, or polled. Every deed that is pleaded shall be intended to be a deed poll, unless it be alleged to be indented.

"All the parts of the indenture are but one deed in law." If a man by deed indented make a gift in tail, and the donee dieth without issue, that part of the indenture which belonged to the donee doth now belong to the donor, for both parts do make but one deed in law.

"And every part of the indenture is of as great force, &c." This is manifest of itself, and is proved by the books aforesaid.

It is to be observed, that if the feoffor, donor, or lessor seal the part of the indenture belonging to the feoffee, &c., the indenture is good, albeit the feoffee never sealeth the counterpart belonging to the feoffor, &c. See also Butler's note (133) *ad loc.*

On the reason why deeds were required to be on paper or parchment, see Pollock, Contr. (2d ed.) 129.

In *Burchell v. Clark*, 1 C. P. D. 602; s. c. 2 C. P. D. 88 (1876), the *habendum* of a lease stated the term as ninety-four and one quarter years, the *reddendum* stated it as ninety-one and one quarter years, and in the counterpart the *habendum* and *reddendum* both stated the term as ninety-one and one quarter years. The Common Pleas Division (*Brett and Archibald*, JJ.) held, that the statement of the *habendum* must prevail. But the Court of Appeal (*Cockburn*, C. J., and *Bramwell* and *Amphlett*, JJ.; *Kelly*, C. B., dissenting) reversed the judgment of the Common Pleas Division.

RECITAL OF CONSIDERATION. The existence of the consideration recited in a deed cannot be denied between the parties for the purpose of avoiding the deed. *Wilkes v. Leuson*, Dyer, 169 a; *Trafton v. Hawes*, 102 Mass. 533, 541 (although in the United States, in an action to recover the price of land, a recital in the deed that the purchase-money has been paid, is not conclusive. See 1 Greenl. Ev. § 26). Considerations not stated in a deed, if inconsistent with those which are stated, may be averred and proved. *Mildmay's Case*, 1 Co. 175 (1582); 1 Gray, Cas. on Prop. (2d ed.) 898; *Gale v. Williamson*, 8 M. & W. 405 (1841); *Clifford v. Turrill*, 9 Jur. 633 (1845).

CHAPTER IV.

DESCRIPTION OF PROPERTY GRANTED.

SECTION I.

LAND NOT APPURTENANT TO LAND.

ARCHER v. BENNETT.

KING'S BENCH. 1664.

[Reported 1 Lev. 181.]

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EJECTMENT, and upon Not guilty, a special verdict: A man seised of a close, on one part whereof was a house, and on another part thereof was a kiln; and also of two mills adjoining to the close; and used and occupied them all together till 1655, when he divided them, and sold the house and a part of the close, and reserved the other part and the kiln, and used them with the mills (and in truth the kiln was a kiln for the drying of oats, and the mills were for the making of oat-meal, but this was not found by the verdict). And afterwards he sold the mills *cum pertinentiis* to the plaintiff: and whether the kiln, and the parts of the close on which they stood, should pass to the plaintiff, was the question. And it was held clearly by the court, that they did not pass; for by the grant of a messuage or lands *cum pertinentiis*, any other land or thing cannot pass, though by the words *cum terris pertinentibus* it would: and gave judgment for the defendant. But by WYNDHAM, Justice, if all the matter had been found, and that the kiln was necessary for the use of the mills, and without which they were not useful, the kiln had passed as part of the mills, though not as appurtenances. As by the grant of a messuage, the conduits and water-pipes shall pass as parcel, though they are remote; to which no answer was given.¹

¹ In *Hill v. Grange*, 1 Plowd. 164 (1557), the question was what passed by a demise of a messuage, with all the lands to the same messuage appertaining. The judges "all argued to the same intent, and agreed unanimously that land could not be appurtenant to a messuage in the true sense of the word *appertaining*. For a messuage consists of two things, viz., the land and the edifice; and before it was built upon it was but land, and then land cannot be appurtenant to land. For a thing of one substance cannot be appurtenant to a thing of the same substance, and when it is built upon then it is a messuage, and consists in a great measure of the same substance that it did before. But the name is changed entirely, so that if the building afterwards falls to decay, yet it shall not have the name of land, although there be nothing in substance left but the land, but it shall be called a *toft*, which is a name superior to land, and inferior to messuage; and this name it shall have in respect of the dignity

SECTION II.

BOUNDARIES.¹A. *In general.*

PERNAM v. WEAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1809.

[Reported 6 Mass. 131.]

IN a writ of *entry sur disseisin*, the demandant declared on his own seisin, and on a disseisin by the tenant. The tenant claimed under a which it once bore. But the chief substance of a messuage is the soil, although the superstructure and the soil are one entire thing; and then nothing can be appurtenant to another but where it is of another nature and substance. And therefore it was said, there is *hereditas corporata* and *hereditas incorporata*. *Hereditas corporata* is such as messuage, land, meadow, pasture, rents, and the like, which have substance in them, and may continue always. But *hereditas incorporata* is such as advowsons, villains, ways, commons, courts, piscaries, and the like, which are or may be appendant or appurtenant to inheritances corporate; and such things are and may be termed appurtenances. And Bracton calls the things which are inheritances corporate things corporeal; and after he has treated of corporeal things, he has a chapter concerning appurtenances, wherein he treats of such things corporeal, *ut supra*, which are belonging, appendant, or appurtenant to things incorporeal. But a gross name may contain divers things corporeal, as a manor, monastery, rectory, castle, honor, and the like, are things compound, and may contain altogether messuages, lands, meadows, wood, and such like, and a thing corporeal may be parcel of a gross name, and of a thing compound, but one simple thing corporeal cannot be a parcel of or appurtenant to another simple thing corporeal. As land cannot be parcel of or appurtenant to meadow, nor meadow parcel of or appurtenant to pasture, nor pasture parcel of or appurtenant to wood, nor can land be parcel of or appurtenant to a messuage, nor to any other thing corporeal, for these things are but simple things, which of themselves cannot receive or include other things corporeal. But an advowson, way, estovers, and such like things incorporeal may well enough be appurtenant to a messuage, and so is the difference. And although it is here pleaded that the land has been appurtenant to the messuage from time immemorial, this pleading or averment is to no purpose or effect. For a man cannot aver that to be appurtenant which the law will not suffer to be appurtenant, though usage and continuance may make a law in such things as stand with and are consonant to reason. But in things which are against law and reason, there usage and continuance is to no purpose, as here the pleading or averment that the land has been always appurtenant to the messuage, is an averment that that is law which is not law. And all the four justices agreed unanimously that the averment or pleading that the land has been always appurtenant to the messuage is not good here, and also they agreed that land might not be appurtenant to a messuage in the true and proper definition of an appurtenance. But yet all of them (except BROWN, Justice, who did not speak to this point) agreed that the word (*appertaining* to the messuage) shall be here taken in the sense of *usually occupied* with the messuage, or *lying* to the messuage, for when *appertaining* is placed with the said other words, it cannot have its proper signification, as it is said before, and therefore it shall have such

¹ The topic of Boundaries has been selected as that which furnishes most opportunity for the development of general rules.

levy of an execution extended upon the demandant's land, issued upon a judgment recovered against him by one Edmund Sawyer.

On the trial, which was had before *Sewall, J.*, at the sittings here after the last November Term, upon the general issue, the only question in dispute was, whether the land, which the tenant claimed to hold, was included within the bounds of the land, on which the execution was extended. Upon the evidence, the judge was of opinion with the tenant, and so directed the jury; but they found a verdict for the demandant. The tenant thereupon moved for a new trial, because the verdict was against evidence.

From the report of the judge, it appears that the land on which the execution of Sawyer was extended, was bounded south-westwardly by Drury Lane, thirty-five feet; north-eastwardly by the land of Sanborn and Collins, ninety-nine feet; north-westwardly by other land of the demandant, *about thirty-five* feet, by a line parallel to Drury Lane; and south-westwardly by land of Fletcher, ninety-nine feet; and this parcel is said to contain thirteen rods.

From a plan which had been taken under an order of the court, the line on Drury Lane, extending from the land of Sanborn and Collins to the land of Fletcher, appears to be thirty-five feet three inches and a half; and by the same plan, the line on the demandant's other land appears to be forty-two feet nine and a half inches; and this last extent of line is preserved for twenty-eight feet six inches from the said other land of the demandant towards Drury Lane, where the length of the line is thirty-seven feet three and a half inches.

signification as was intended between the parties, or else it shall be void, which it must not be by any means, for it is commonly used in the sense of *occupied with*, or *lying to*, *ut supra*, and being placed with the said other words it cannot be taken in any other sense, nor can it have any other meaning than is agreeable with law, and forasmuch as it is commonly used in that sense, it is the office of judges to take and expound the words, which common people use to express their meaning, according to their meaning, and therefore it shall be here taken not according to the true definition of it, because that does not stand with the matter, but in such sense as the party intended it. As where a lease was made for life, and after his death that the lands *redibunt* to a stranger, it was taken as *remanebunt*, for to that purpose the party there used it, and therefore, by 18 Ed. 3, it shall be taken by way of a remainder. And so a lease for life, the *reversion* to a stranger, shall be taken for a *remainder*, *causa qua supra*. And many other cases were put where a word shall be taken out of its natural sense, according to the sense intended by the party. So the word (*appertaining*) shall be here taken as *occupied*, *used*, or *lying with*, or to the messuage, and in such sense the averment may serve to declare that the land has been always occupied with, or has lain to the messuage, and the demise shall serve to convey the same to the defendant, and so the bar is good, notwithstanding the said exception. And that was the opinion of the said three justices. And afterwards it was adjudged accordingly, as appears hereafter by the judgment. And in this argument *BROWN* and *SAUNDERS*, Justices, held, that a garden and curtilage are parcel of a messuage: and *SAUNDERS* said that a dove-house, a mill, and shops may be parcel of a messuage, and shall pass by the name of a messuage" (pp. 170, 171).

In *Hanbury v. Jenkins*, L. R. [1901] 2 Ch. 401, 421, 422, the court was of opinion that one incorporeal hereditament (a way) could be appurtenant to another incorporeal hereditament (a fishery).

The demandant insisted that, as there was an over-measure of three and a half inches on one side, he ought to recover on that side a strip of that width the whole length of the parcel extended upon; and as, on the other side, there was an over-measure of five feet six inches, extending twenty-eight feet six inches, in the form of a parallelogram, he ought also to recover that parallelogram. But it was agreed that Drury Lane, the land of Sanborn and Collins on one side, and the land of Fletcher on the other side, are all fixed, known monuments, about which there was no dispute; and that there was no question between the parties as to the other land of the demandant's parallel to Drury Lane. The demandant relied not only on the admeasurement, but also on the contents, which give the tenant thirteen rods and two fifths, instead of thirteen rods, the contents stated in the extent of Sawyer's execution.

There was no argument, and the opinion of the court was delivered to the following effect by

PARSONS, C. J. Upon considering the facts in this case, we have no doubt as to the motion. It must prevail, and a new trial be granted. When the facts were agreed by the parties, or proved at the trial, the result was a mere conclusion of law. And on these points the law has been long settled.

When the boundaries of land are fixed, known, and unquestionable monuments, although neither courses, nor distances, nor the computed contents, correspond, the monuments must govern. With respect to courses, from errors in surveying instruments, variation of the needle, and other causes, different surveyors often disagree. The same observations apply to distances, arising from the inaccuracy of measures, or of the party measuring; and computations are often erroneous. But fixed monuments remain: about them there is no dispute or uncertainty; and what may be uncertain must be governed by monuments, about which there is no dispute.

In the present case, Sanborn and Collins's land on one side, and Fletcher's on the other, are fixed monuments. The land is bounded on them, and must extend in width from one to the other. If the contents had proved less than thirteen rods, yet the tenant could claim only to those monuments; and where the contents are found to be greater, he still shall hold to the same monuments. The jury therefore mistook the law; and the cause must be sent to another jury to correct the mistake.

*New trial ordered.*¹

¹ In *White v. Luning*, 93 U. S. 514, 524 (1876), the court said, "It is true, that, as a general rule, monuments, natural or artificial, referred to in a deed control, on its construction, rather than courses and distances; but this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify and render certain the land which the sheriff intended to convey, it would certainly be absurd to retain the false call and thus defeat the conveyance."

In *Kendall v. Green*, 67 N. H. 557 (1893), it was held that the measurement of land

LERNED v. MORRILL.

SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE. 1820.

[Reported 2 N. H. 197.]

THIS was a writ of entry, in which the demandant counted upon his own seisin within twenty years and upon a disseisin by the tenant.

The cause was tried here at April Term, 1819, upon the general issue, when a verdict was taken for the demandant, subject to the opinion of the court, upon the following facts.

The tenant, by deed dated March 8, 1806, conveyed to the demandant a tract of land described in the deed as follows: "being the westerly part of lot No. 2, and containing 80 acres, beginning at the northwest corner on Boscawen line; then south by Lerner's land to Contoocook river to a poplar tree, thence by said river to a stake and stones, thence northwardly a parallel line with the side line of said lot to a stake and stones on Boscawen line, thence on said Boscawen line to the bound first mentioned." The stakes and stones mentioned in the deed were not erected at the time of making the deed; but about eighteen months afterwards, the parties went upon the premises with a surveyor and chain-men to run out and locate the land, and they erected the stakes and stones at the north-east and south-east corners of the premises. The parties first measured the whole lot, divided it in the middle, and then measured off ten acres from the east half and adjoining the west half, and set up stakes and stones at the north-east and south-east corners of the land so measured off, and ran the line from one stake and stones to the other, and set up stakes and stones at every tally. The tenant immediately cleared his land up to the line and built a fence upon it. The demandant also built a board fence on the line, and the parties occupied and improved the land on each side of that line till 1817. It was proved that the tenant said the demandant bought ten acres more than half the lot. In the fall of 1817, the defendant surveyed the lot, and finding that the demandant had more than eighty acres, removed the fence, and went into possession of all but eighty acres, and this action is brought to recover the land, of which the tenant thus took possession.

J. Harris, for the demandant.

PER CURIAM. The question presented to us in this case for decision, has long been settled, and must now be considered as entirely at rest. Where land has been conveyed by deed, and the description of the land in the deed has reference to monuments, not actually in existence at the time, but to be erected by the parties at a subsequent

described in a deed as beginning a certain distance from a house was to be made from the side of the house and not from the edge of the eaves. *Centre Street Church v. Machias Hotel Co.*, 51 Me. 413 (1864), *accord.* *Millett v. Fowle*, 8 Cush. 150 (Mass. 1851), *contra*.

period: when the parties have once been upon the land and deliberately erected the monuments, they will be as much bound by them, as if they had been erected before the deed was made. In this case, there was a reference in the deed to monuments not actually existing at the time, but the parties soon after went upon the land with a surveyor, ran it out, erected monuments, and built their fences accordingly; and this is not all. They respectively occupied the land according to the line thus established, for nearly ten years. And there is now no evidence in this case of any mistake or misapprehension in establishing the line. There is no pretence that the tenant could lawfully remove monuments thus deliberately erected and so long acquiesced in. His claim to the demanded premises, for ought that appears in this case, is without any foundation whatever, and there must be

Judgment for the demandant.

EMERY v. FOWLER.

SUPREME JUDICIAL COURT OF MAINE. 1854.

[Reported 38 Me. 99.]

On exceptions from *Nisi Prius*, *Tenney*, J., presiding.

Trespass. Plea, general issue.

Both parties claimed the land where the alleged trespass was committed, and the question was as to the line between them.

The title on both sides was derived from John C. Freeze, who on July 2, 1832, conveyed to Stephen Nye (under whom defendant claims), the following tract: "beginning at the southwest corner of said lot of land this day sold and conveyed to me by said Stephen and Heman Nye; thence across said lot to the Rolfe road (so called), on such a course as that a line extended across said lot to said road, and thence on said road northerly to a point in said road where it is intersected by the head line of said lot; and thence on the head line thereof to the place of beginning, shall contain *exactly one acre and a half*."

Freeze conveyed to T. Boutelle (under whom the plaintiff claims), on the same day, a certain tract of land embracing in its description the land conveyed to Nye and a larger tract, in which was this reservation: "excepting and reserving from the lot hereby sold two small lots of land lying at the head of said lot, containing one acre and a half, as by reference to my deed of said two lots to Stephen Nye of even date will appear, reference thereto being had."

Boutelle conveyed to the plaintiff, April 25, 1835. Nye conveyed by quitclaim to one Benjamin F. Wing, February 14, 1837, and Wing conveyed to the defendant, April 24, 1847.

While the adjoining lands were owned by plaintiff and Wing a controversy arose about the line, and they agreed in writing to submit the

determination of it to two referees. Before the time appointed for a hearing, Wing sold the land to the defendant, and it did not appear that he had any knowledge of the agreement of his grantor. The referees notified the parties to the submission, and made an award.

This submission and award were offered in evidence by the plaintiff, but, being objected to by defendant, were excluded by the court.

Evidence was offered by defendant tending to show that on the day the deeds were made by Freeze to Boutelle and Nye, a claim was made on Freeze for some improvements upon the lots by Nye and another; *that* that controversy was referred to two persons to determine it, who awarded that Freeze should convey to Nye one acre and one half from the lot; *that* they located the land upon the earth by the consent of Freeze, Boutelle and Nye; *that* those referees put up stakes upon the line run by them; *that* the deed was written immediately after this location, and delivered; *that* Nye went into possession under the deed and so continued until he conveyed. There was other evidence in the case.

On this part of it, the jury were instructed, that they would look at all the evidence touching the location and conveyance of this parcel of land, and although the deed described only one acre and one half, still if the grantor therein located the same by adopting and consenting to the line made by the referees, and the deed was made immediately after such location, the boundaries being assented to by the parties to the deed and said Boutelle, who took conveyance of the residue of the Freeze lot, if such was the fact, those boundaries and monuments were controlling, notwithstanding it might be found afterwards that they embraced more or less, than the quantity specified.

The jury returned a verdict for defendant, and the plaintiff excepted to the instruction.

J. S. Abbott, for plaintiff.

Evans and *J. H. Webster*, for defendant.

APPLETON, J. The plaintiff and defendant are owners of adjacent land, deriving title through various mesne conveyances from John C. Freeze. The question in controversy relates to the boundary line between their respective lots.

The plaintiff and Benj. F. Wing, under whom the defendant derives title, on June 9, 1846, entered into bonds to refer the dispute which had arisen in relation to the lines between their lots, to Samuel Taylor and Joseph Burgess, Jr., and bound themselves, their executors and administrators, in the penal sum of one hundred dollars to abide by the decision of the arbitrators thus appointed. On the 24th of April, 1847, Wing conveyed the lot, the boundary line of which is in controversy, to the defendant. There is no evidence that the defendant, when he received his conveyance, had any notice of the agreement to refer, into which his grantor had entered. It is unnecessary to consider what would have been the effect of an award made before his title accrued. It is obvious, that he acquired the land discharged from all contracts,

which his grantee had made, of which he had no notice, actual or constructive.

It seems, that on July 17, 1847, the referees, after notifying Wing and Emery, proceeded to adjudicate upon the matters in controversy and made their award. The hearing was *ex parte*, Wing not being present. The defendant had no notice of these proceedings, nor did he assent in any way to the doings of the referees. The award made under these circumstances, was offered by the plaintiff and rejected by the court, and as we think, rightfully rejected. At the time of the hearing Wing had no title to the land, and could not by his acts or omissions to act, affect the rights of his grantee. The award must be regarded as a transaction between other parties and having no binding force whatever upon the defendant.

John C. Freeze originally owned the lot embracing the land of the plaintiff and the defendant. The plaintiff derives his title by deed from him to Timothy Boutelle, dated July 2, 1832, and the defendant by deed from him to Stephen Nye of the same date. In the deed from Freeze to Boutelle, reference is made to the deed to Nye, and the tract conveyed to the latter is excepted from the operation of the deed to the former. Before these deeds were made, the lots to be conveyed were located upon the face of the earth, fixed monuments established by referees mutually agreed upon, and the parties to these several conveyances assented to and adopted such location.

Deeds were then executed by the parties intended to conform with the location thus made. The respective grantees entered under their deeds, built fences and occupied in conformity with the location of 1832, till 1847, when a dispute arose. It seems that more land is contained within the limits of the defendant's land, as originally located upon the face of the earth, than is specified in the deed. The court in substance instructed the jury, that if they found the facts to be as above stated, "that these boundaries and monuments were controlling, notwithstanding it might be found afterwards that they embraced more or less than the quantity specified."

Whether monuments are erected upon the face of the earth by the mutual agreement of parties, and a deed is given intended to conform thereto, or whether they are subsequently erected by them with intent to conform to a deed already given, those monuments must control, notwithstanding they may embrace more or less land than is mentioned in the deed. The quantity of land is always deemed of secondary importance when compared with fixed and determined boundaries. The instructions given are in accordance with the entire weight of authority, and the exceptions must be overruled. *Waterman v. Johnson*, 13 Pick. 261; *Kennebec Purchase v. Tiffany*, 1 Greenl. 219.

*Exceptions overruled.*¹

SHEPLEY, C. J., and RICE and CUTTING, JJ., concurred.

¹ In *McKinney v. Doane*, 155 Mo. 287 (1899), a tract of land had been surveyed and stakes set at the corners of the lots. A plat of the tract was recorded and lots

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KNOWLES v. TOOTHAKER.

SUPREME JUDICIAL COURT OF MAINE. 1870.

[Reported 58 Me. 172.]

ON report. Writ of entry. Case is fully stated in the opinion.

S. Belcher, for the plaintiff.

P. M. and P. H. Stubbs, for the defendant.

DICKERSON, J. Writ of entry. Both parties claim title through the same grantor, Henry Smith, who, in the first instance, conveyed "parts of lots numbered 9 and 10, on the east side of Sandy River," to the defendant. After reciting the other boundaries, the description in the deed continues as follows, "thence easterly by a line parallel with the north line of lot No. 9 to the county road," the grantee taking the land north of the line now in dispute, and the grantor retaining the land south of it. The line was run and marked by a surveyor immediately after the conveyance, and the parties then built a fence on it, intending it for a division fence, Smith occupying to the fence on the south, and the defendant on the north side of the fence, for some six years, when Smith conveyed his remaining parcel to the plaintiff's grantor, describing the line in controversy as follows, "to land supposed to be owned by George Toothaker, thence easterly on said Toothaker's south line to the county road." About eight months afterwards, the grantee conveyed the last named premises to the plaintiff, describing it as "the same she purchased of Henry Smith." The plaintiff claims to hold to the line described as running "easterly by a line parallel with the north line of said lot No. 9 to the county road," in Smith's deed to the defendant, which is several rods northerly of the fence, and the defend-

were sold by reference to this recorded plat. The plat contained no reference to the stakes. The owner of the tract, A, sold two lots to B and subsequently sold an adjoining lot to C. The court held that if, at the time of the sale to B, A pointed out the stakes to B and B took possession of the lots, made improvements and built fences thereon in accordance with the stakes, then, as between A and B and any subsequent grantees having knowledge of the facts, B became the owner of the lots as bounded by the stakes even though the lots as so bounded may not have agreed with the lots as shown on the recorded plat; but that subsequent grantees without knowledge of the facts were not affected. "One who purchases a surveyed lot, or tract of land, without notice of the actual boundary, or corners, has the right to rely upon what appears from the original survey, or plat thereof, and is not bound by monuments which do not appear therefrom to have been placed upon the land."

In *Negbauer v. Smith*, 44 N. J. L. 672 (1882), A conveyed to B by warranty deed with full covenants a tract of land described as being "80 feet or a fraction more or less" in depth. The tract owned by A was not in fact more than 67 feet in depth. When the deed was given there was a line fence in the rear of the tract dividing the property in question from other land not owned by A. There was no mention in the deed of any monuments defining the rear of the lot. Held that B was entitled to recover on his covenants by reason of the deficiency in the depth of the lot.

ant claims to hold to the divisional line made by the fence; and the question is, which is the true line between the parties?

The presiding judge ruled that the words, "on said Toothaker's south line," would limit the plaintiff's land to the line established by Toothaker and Smith, on which the division fence was built, and that she could not hold beyond this line, even if she could satisfy the jury that it did not conform to the original lot line; thereupon the parties agreed to submit the question to the law court, judgment to be rendered for the defendant if the ruling is correct; if not, the action is to stand for trial.

But for the acts of the parties in interest, in running, marking, and locating the line, building a fence upon it immediately after the conveyance, and occupying up to it down to the commencement of this suit, the line on the course described in the deed, if it could be ascertained, would be the line between the two parcels. Did these acts fix and establish the divisional line as the true line?

It was early held that where a deed refers to a monument, not actually existing at the time, but which is subsequently placed there by the parties for the purpose of conforming to the deed, the monument so placed will govern the extent of the land, though it does not entirely coincide with the line described in the deed. *Makepeace v. Bancroft*, 12 Mass. 469 (1815); *Kennebec Purchase v. Tiffany*, 1 Greenl. 211 (1821); *Lerned v. Morrill*, 2 N. H. 197 (1820).

Again it was held in *Moody v. Nichols*, 16 Maine, 23 (1839), that when parties agree upon a boundary line, and hold possession in accordance with it, so as to give title by disseisin, such boundary will not be disturbed, although found to have been erroneously established. In that case the call in the deed was "a line extended west, so as to include" a certain number of acres, the boundaries upon the other three sides having been accurately described. The parties to the deed agreed upon and marked that line, erected a fence upon it, and held possession according to it for thirty years.

The same doctrine was held by the Supreme Court of the United States, in giving construction to a line described in the deed as "running a due east course" from a given point. *Missouri v. Iowa*, 6 How. 660.

So the court in Massachusetts, in giving effect to a deed, describing a line as "running a due west course" from a given point, held that the line located, laid out, assented to, and adopted by the parties, was the true line, though it varied several degrees from "a due west course." *Kellogg v. Smith*, 7 Cush. 382 (1851).

In *Emery v. Fowler*, 38 Maine, 102 (1854), the call in the deed was a line from a given point, "on such a course . . . as shall contain exactly one and a half acres." The lots to be conveyed were located upon the face of the earth by fixed monuments, erected by referees mutually agreed upon; and the parties to the several conveyances assented to and adopted the location before the deeds were given. Deeds intended to conform to the location thus made were then executed by the parties. The respective grantees entered under the deeds, built fences,

and occupied in conformity with the location for fifteen years, when, it being found that more land was contained within the limits of the actual location upon the face of the earth than was embraced within the calls of the deed, a dispute arose. The court held that the monuments thus erected before the deed was given, must control, thus extending the rule adopted in *Moody v. Nichols* to cases where the possession had not been long enough to give title by disselsin. That decision also makes the rule of construction the same, whether the location is first marked and established, and the deed is subsequently executed, intended to conform to such location, or whether monuments, not existing at the time, but referred to in the deed, are subsequently erected by the parties with like intention.

In construing a deed, the first inquiry is, What was the intention of the parties? This is to be ascertained primarily from the language of the deed. If this description is so clear, unambiguous, and certain, that it may be readily traced upon the face of the earth from the monuments mentioned, it must govern; but when, from the courses, distances, or quantity of land given in a deed, it is uncertain precisely where a particular line is located upon the face of the earth, the contemporaneous acts of the parties in anticipation of a deed to be made in conformity therewith, or in delineating and establishing a line given in a deed, are admissible to show what land was intended to be embraced in the deed. It is the tendency of recent decisions to give increased weight to such acts, both on the ground that they are the direct index of the intention of the parties in such cases, and, on the score of public policy, to quiet titles. The ordinary variation of the compass, local attraction, imperfection of the instruments used in surveying, or unskilfulness in their use, inequalities of surface, and various other causes, oftentimes render it impracticable to trace the course in a deed with entire accuracy. If to these considerations we add, what is too often apparent, the ignorance or carelessness of the scrivener in expressing the meaning of the parties, we shall find that the acts of the parties in running, marking, and locating a line, building a fence upon it, and occupying up to it, are more likely to disclose their intention as to where the line was intended to be, when the deed was given, than the course put down on paper, if there is a conflict between the two.

Hence the rule of law now is, that when, in a deed or grant, a line is described as running from a given point, and this line is afterwards run out and located, and marked upon the face of the earth by the parties in interest, and is afterwards recognized and acted on as the true line, the line thus actually marked out and acted on is conclusive, and must be adhered to, though it may be subsequently ascertained that it varies from the course given in the deed or grant.

The acts of the defendant and Smith, through whom the plaintiff claims, in surveying and marking the line in dispute upon the face of the earth by stakes and stones and spotted trees, building a fence thereon,

intending it to be the line between them, and occupying up to it, make and establish such line as the divisional line between the two lots.

The ruling of the presiding judge was in accordance with this construction of the deeds, and there must be

*Judgment for defendant.*¹

APPLETON, C. J., CUTTING, KENT, BARROWS, and DANFORTH, JJ., concurred.

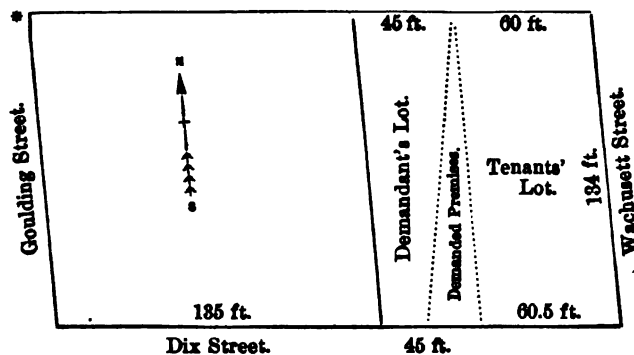
112 HALL v. EATON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[Reported 189 Mass. 217.]

Writ of entry to recover a lot of land in the city of Worcester. Plea, *Nul disseisin*. Trial in the Superior Court, without a jury, before *Blodgett, J.*, who allowed a bill of exceptions, in substance as follows:—

The land in dispute was a triangular tract on the northerly side of Dix Street, marked on a plan used at the trial, a copy of which is printed in the margin,* as “Demanded Premises.” It appeared that all



the land lying next northerly of Dix Street and between Wachusett Street on the east and Goulding Street on the west was formerly owned by Henry Goulding, and was divided into lots and sold by his executors. The tenants' lot was at the corner of Dix Street and Wachusett Street, and the demandant's lot was part of the lot next westerly, and the question was as to the westerly boundary of the tenants' lot and the easterly boundary of the demandant's lot, under the following deeds:—

¹ Cf. *Reynolds v. Boston Rubber Co.*, 160 Mass. 240 (1893); *Iverson v. Swan*, 169 Mass. 582 (1897); *Savill Bros., Lt. v. Bethell*, L. R. [1902] 2 Ch. 528.

On February 20, 1869, Goulding's executors conveyed the corner lot to Blackmer and Kelley (under whom the tenants derive their title), by the following description: "A certain lot of land situated in the city of Worcester, on the westerly side of Wachusett Street and northerly side of Dix Street, bounded and described as follows, to wit: beginning at the southeasterly corner of the lot conveyed, and at the intersection of said streets; thence running northerly by Wachusett Street one hundred and thirty-four feet, to land of the heirs of Henry Goulding; thence running westerly by land of the heirs of said Goulding, sixty feet; thence running southerly by land of said heirs at right angles to said Dix Street one hundred and twenty-five feet to Dix Street; thence running easterly by Dix Street sixty-one feet more or less to the first-mentioned bound, containing 7,770 feet more or less."

On October 8, 1869, said executors conveyed the residue of the land between the tenants' lot and Goulding Street to one King, by a deed which contained the following description: "Lot of land on the northerly side of Dix Street, bounded as follows: beginning at the southeasterly corner of the lot at a corner of land of Kelley and Blackmer and running westerly on Dix Street one hundred and eighty feet to a new street about to be made; thence turning and running northerly on said new street one hundred and twelve and a half feet, to land belonging to the estate of the late Henry Goulding; thence turning and running easterly on said Goulding estate one hundred and eighty feet, to land of Kelley and Blackmer; thence turning and running southerly on land of said Kelley and Blackmer one hundred and twenty-five feet, to the place of beginning on said Dix Street."

It was agreed that the new street referred to was Goulding Street, and the corner of Goulding Street and Dix Street was a known and fixed bound.

On May 8, 1871, King conveyed to the demandant a part of said lot, forty-five feet wide on Dix Street, bounded as follows: "beginning at the southeasterly corner thereof at corner of land of Kelley and Blackmer, and at a point one hundred and eighty feet distant from the easterly line of Goulding Street, thence northerly on land of Kelley and Blackmer one hundred and twenty-five feet, to land of the estate of Henry Goulding; thence westerly on said land of Goulding forty-five feet; thence southerly and parallel with the first-described line one hundred and twenty-five feet more or less, to said Dix Street; thence easterly on Dix Street forty-five feet, to the place of beginning."

The corner of Dix Street and Wachusett Street was a known and fixed bound, and the northerly line of Dix Street was a known and fixed line.

If the third line described in the deed of the executors to Blackmer and Kelley is drawn at right angles to Dix Street, it strikes a point on Dix Street eighty feet and fifty-two one-hundredths of a foot from Wachusett Street, and one hundred and sixty-one feet and ninety-four one-hundredths of a foot from Goulding Street. In such case, the tenants'

line on Dix Street is eighty feet and fifty-two one-hundredths of a foot in length, and is shown by the westerly dotted line, and their lot contains 9,101 square feet.

If the third line described in said deed to Blackmer and Kelley is drawn so as to strike Dix Street one hundred and eighty feet easterly from Goulding Street, the tenants' line on Dix Street is sixty feet and a half in length, and their lot contains exactly 7,770 square feet.

The demandant offered evidence tending to show that, before the several lots were sold by the executors of Henry Goulding, they prepared a plan of them, which was produced at the trial; and it was testified by one of the executors, that the lots were sold by said plan, but there were no monuments at the corners of the lots when the deeds were given, and there was no evidence that Blackmer and Kelley saw the plan before they took their deed. Said plan showed the tenants' lot to have a line of only sixty feet and a half on Dix Street, and showed that the westerly line did not make a right angle with Dix Street.

The demandant also offered evidence tending to show that, in the year 1876, he erected a fence between his said lot and the tenants' lot (Kelley, who had bought Blackmer's interest, then being the owner of the tenants' lot), and by Kelley's consent it was placed on the line as claimed by the demandant, and remained there several years, and until removed by the tenants a short time before this suit was brought.

The demandant asked the judge to rule that it was a question of fact, on all the evidence, whether the tenants' westerly line was to be drawn at right angles to Dix Street, and asked a finding in fact that it was to be drawn at an angle to said Dix Street, so as to strike said street sixty and a half feet from Wachusett Street. The judge ruled, as matter of law, that the said line was to be drawn at a right angle to Dix Street, without regard to the evidence outside of the deeds; and found for the tenants. The demandant alleged exceptions.

F. P. Goulding, for the demandant.

H. E. Hill, for the tenants.

W. ALLEN, J. The courses of the lines on Wachusett Street and Dix Street are fixed on the land, and fix the angle contained by them. There is nothing on the land to fix the course of the second or of the third line, for it does not appear that the line of the land of the heirs of Henry Goulding mentioned is fixed. The description in the deed gives the length of the first, second, and third lines, which there is nothing to control, and the angle contained by the third and fourth lines. There is no difficulty in locating this description upon the land, and it makes the length of the fourth line eighty feet and fifty-two one-hundredths of a foot, and the contents of the lot 9,101 square feet. The description in the deed gives the length of the fourth line as "sixty-one feet more or less," and the contents of the lot as "7,770 feet more or less." This discrepancy of one third in the length of the front line of the lot, and one fifth in its contents, could not have been intended, although the length and dimensions are only approximately given, and

it is obvious that there is a mistake, either in the angle given, or in the length of the fourth line.

We do not regard the statement of the quantity of the land as very material. It is the computation of the contents of the figure described in the deed, but which cannot be produced on the land. The fact that to give exactly the quantity of land mentioned when the other particulars of the description are applied to the land, the third line must intersect the fourth at an obtuse angle, and the fourth line must be sixty feet and a half in length, goes to show, what is otherwise sufficiently apparent, that no such discrepancy in the length was intended. There was a mistake either in the angle given or in the length of the fourth line; they cannot both be applied to the land, though either of them may be, and the question is which must be rejected.

The question to be determined is the intention shown in the language of the deed, in the light of the situation of the land and the circumstances of the transaction, and sometimes with the aid of declarations and conduct of the parties in relation to the subject-matter. The rule that monuments, in a description in a deed, control courses and distances, is founded on the consideration that that construction is more likely to express the intention of the parties. The intention to run a line to a fixed object is more obvious, and the parties are less likely to be mistaken in regard to it than in running a given distance or by a given course. But, where the circumstances show that the controlling intention was otherwise, the rule is not applied. *Davis v. Rainsford*, 17 Mass. 207. *Parks v. Loomis*, 6 Gray, 467. *Chapman v. Murdock*, 9 Gray, 156. So far as the question is as to the relative effect to be given to a course and a distance, neither has in itself any advantage over the other as showing a governing intent. Whether the one in a given case shall outweigh the other, as showing the intention of the parties, must depend upon the circumstances existing at the time.

The angle formed by Dix Street and Wachusett Street is an acute angle; the lot was a corner lot, the front on Dix Street. In laying it out, it would be natural either to have the third line in the description parallel to Wachusett Street, or at a right angle with Dix Street. The latter is for the advantage of the purchasers. The deed shows that the parties had that, and not the other, in mind. Not only is the third line not said to be parallel with Wachusett Street, but it appears that it was not intended to be. The parties understood that the angle at the corner of the streets was an acute angle, and that making the other angle on Dix Street a right angle would require the line on that street to be longer than the rear line, and they said that the angle should be a right angle, and therefore that the line should be longer. It was not merely giving a course to the third line, but it was expressly fixing the shape of the lot. The length of the fourth line was left indefinite, and to be determined by the angle which was fixed. It is true that the given angle requires a longer line than was supposed; but the angle and the shape of the lot, and not the length of the line, appear to have been the controlling considerations. See *Noble v. Googins*, 99 Mass. 231.

It is contended by the plaintiff, that it is a case of latent ambiguity of which may be explained by parol evidence. If the difference between a given course of the third line and measurement of the fourth might present such a case, but neither is given. The course of the third line was not run, but it was to intersect Dix Street at a right angle; the fourth line was not measured, but its length was estimated, and apparently estimated as the distance between the point where the third line must meet Dix Street to form a right angle with it and the first corner. A mistake was made in the estimate of the distance. It would seem that the angle was so material a particular in the description of the lot, that the expressed intention in regard to it could not be made doubtful by a mistake in the estimate of the length of the fourth line, which was determined by it; but it is not necessary to decide this. As the case stood at the trial, and upon the evidence offered, the court properly ruled that, as matter of law, the third line was to be at a right angle with Dix Street, without regard to the evidence outside the deed.

The plaintiff relied upon evidence that the executors of Goulding, before the lot was sold, made a plan of this and other lots, by which it appeared that the fourth line was sixty feet and a half in length, and that the angle formed by the third line and Dix Street was an obtuse angle. This plan is not referred to in the deed, and was not seen by the purchasers. The only effect of this evidence would be to show that the grantors knew that the lot described in the deed did not correspond with the one on the plan, and did not inform the grantees.

Eight months after the conveyance to Blackmer and Kelley, the executors conveyed to one King the adjoining lot on Dix Street, extending westerly to a way to be laid out, called Goulding Street, bounding easterly on the land of Blackmer and Kelley and the line on Dix Street, and the rear lines being each one hundred and eighty feet in length. This evidence may tend to show that the executors intended that the third line of the Blackmer and Kelley lot should be parallel with Goulding Street, but such intention was not known to Blackmer and Kelley, and was not expressed or indicated in the deed to them. The demandant also relied upon evidence that King afterwards conveyed to the demandant a lot adjoining Blackmer and Kelley, described as beginning at a corner of their land on Dix Street one hundred and eighty feet from Goulding Street, and that several years after, and seven years after the conveyance to Blackmer and Kelley, and after Kelley had acquired Blackmer's interest, the demandant put up a fence between his lot and Kelley's, and, with Kelley's consent, put it on the line now claimed by the demandant, where it remained for several years.

We do not see that any of this evidence is competent to control the construction indicated by the deed itself. It is not sufficient to show a practical construction of the deed by the parties to it, nor an admission by the tenants' grantor which can bind the tenants, nor a mutual agree-

ment as to the boundary, and occupation accordingly. See *Liverpool Wharf v. Prescott*, 7 Allen, 494; *Miles v. Barrows*, 122 Mass. 579; *Lovejoy v. Lovett*, 124 Mass. 270. Whether evidence of the construction of the deed by the acts of the parties by locating the third line on the land, or fixing the point of its intersection with Dix Street by a monument or otherwise, would present a question for the jury, we need not consider, because the evidence offered was not sufficient to show such acts, and the question presented was one of law upon the construction of the deed.

A majority of the court are of opinion that the ruling excepted to was correct. *Exceptions overruled.*¹

B. On Water.

STARR v. CHILD.

SUPREME COURT OF JUDICATURE, AND COURT FOR THE CORRECTION OF ERRORS OF NEW YORK. 1838, 1842.

[Reported 20 Wend. 149; 4 Hill, 309.]

THIS was an action of ejectment, tried at the Monroe Circuit in October, 1835, before the *Hon. Addison Gardiner*, then one of the circuit judges.

The plaintiffs claimed title to the premises in question on the following state of facts: It was admitted that previous to the 13th August, 1817, Charles Carroll, William Fitzhugh and Nathaniel Rochester were seised of a tract of 100 acres of land covering the premises in question, and that both plaintiffs and defendants claim under that title. The plaintiffs then produced in evidence, 1. A *partition deed* between Carroll, Fitzhugh and Rochester of the above tract, bearing date 13th August, 1817, by which *mill-seat lot number twelve* (the premises in question), among other parcels, was allotted to Rochester; 2. A second partition deed between the same parties, bearing date 19th September,

¹ In *Loring v. Norton*, 8 Greenl. 61, 68 (Me. 1831), the court said: "The general principle is, that what is most material and most certain shall control what is less material and less certain, as that both course and distance shall yield to natural and ascertained objects. But when established monuments are wanting, and the courses and distances cannot be reconciled, there is no universal rule that requires that the one should be preferred to the other. Cases may exist in which the one or the other may be preferred, as shall best comport with the manifest intentions of the parties to the transaction, and correspond with all the other circumstances of the case."

In *Krusc v. Scripps*, 11 Ill. 98, 103 (1849), the court said, "If a tract of land is conveyed by metes and bounds, or any other certain description, the grantee takes all of the land included within the designated limits, although the quantity may exceed what is stated in the deed; and he is restricted to those limits, if the quantity turns out to be less than is represented. The statement of quantity is considered as the most uncertain part of the description, and when inconsistent with boundaries, courses or distances, must be rejected."

1822, whereby certain alterations were made in the *numbers and size* of various mill-seat lots; and other mill-seats laid out and divided between them; 3. A deed from Rochester to William Cobb, bearing date 9th November, 1819, conveying "All that certain piece or *parcel of mill-seat lot No. 12* in the village of Rochester, beginning at the northwest corner thereof *on the south bounds of Buffalo Street*, running thence southwardly along the east bounds of the mill-yard and at right angles with Buffalo Street 80 feet; thence eastwardly parallel with Buffalo Street *about 45 feet to the Genesee River*; thence northwardly *along the shore of said river to Buffalo Street*; thence along the south bounds of Buffalo Street westwardly to the place of beginning: *together with the privilege of taking water from the present mill-race* near the mill now occupied by Bissel & Ely; such water to be conveyed in front of and near the said mill and *below the surface of the ground*, to be kept well covered so as not to obstruct the passage and use of the mill-yard, &c. &c." (prescribing the quantity of water to be used; giving a right in common to the use of the *mill-yard* fronting the mill occupied by Bissel & Ely and extending to the said lot number *twelve*; and subjecting the grantee to a proportion of the *expense of repairs* on the dam and race-way, &c. &c.); and 4. The plaintiffs produced in evidence a deed from the said Nathaniel Rochester to *Thomas Morgan* bearing date on the same day with the deed last mentioned, conveying the *residue* of the said mill-seat lot No. 12 to the grantee, in which the premises conveyed are described as beginning at the *southwest corner* of the premises conveyed to Cobb, running thence southwardly along the east bounds of the mill-yard 25 feet; "thence eastwardly along the north bound of an alley and parallel with Buffalo Street *to the Genesee River* (nearly fifty feet); *thence northwardly along the shore of the Genesee River* to William Cobb's corner;" thence to the place of beginning. "*Together with the privilege of taking water from the present mill-race*," &c. &c. (containing the same provisions as in the deed to Cobb). After the production of those deeds, the plaintiffs deduced a regular title under the same to themselves. The judge charged the jury that upon a true construction of the deeds executed by Rochester to Cobb and Morgan, the grantees *had obtained title to the centre of the Genesee River*, and that title having become vested in the plaintiffs, he directed the jury to find a verdict for them, which they did according to such direction.¹

S. Beardsley (Attorney-General), for the defendants.

O. Hastings, for the plaintiffs.

WALWORTH, CHANCELLOR. The decision of a majority of this court in the case of *The Canal Appraisers v. The People ex. rel. Tibbitts*, 17 Wend. 590, although put upon other grounds by some of the members

¹ The defendants, having excepted to the charge of the judge, moved in the Supreme Court for a new trial. This motion was denied, and the case was then brought by writ of error before the Court for the Correction of Errors. Only the opinion of WALWORTH, C., is given.

who voted for a reversal of the decision of the Supreme Court, cast a shade of doubt upon the question whether the common law rule prevailed here as to the construction of conveyances of lands bounded by or upon a river or stream above tide waters. That doubt, however, is probably removed by the recent decision of this court in the case of *The Commissioners of the Canal Fund v. Kempshall*, 26 Wend. Rep. 404, in which the judgment of the Supreme Court in favor of the riparian owner was unanimously affirmed. The common law rule, as I understand it, is that the riparian proprietor is *prima facie* the owner of the *alveus* or bed of the river adjoining his land, to the middle or thread of the stream; that is, where the terms of his grant do not appear and show that he is limited. And when by the terms of the grant to the riparian proprietor he is bounded upon the river generally as a natural boundary, or, in the language of Pothier, where the grant to the riparian proprietor has no other boundary on the side thereof which is adjacent to the river but the stream itself, the legal presumption is that his grantor intended to convey to the middle of such stream; subject to the right of the public to use the waters of the river for the purposes of navigation in their accustomed channel, where they are by nature susceptible of such use. It has also been decided that the same principle applies to the construction of grants bounded generally upon highways, party-walls, ditches, &c., which constitute natural boundaries between the lands granted and the adjacent property. Thus, in *Jackson v. Hathaway*, 15 John. Rep. 454, although by the terms of the grant in that case the Supreme Court considered the whole of the highway as excluded, Mr. Justice Platt, who delivered the opinion of the court, says: "Where a farm is bounded *along* a highway, or *upon* a highway, or as *running to* a highway, there is reason to intend that the parties meant the middle of the highway." So in *Warner v. Southworth*, 6 Conn. Rep. 471, 474, where the grantor had divided one of his lots from another by an artificial ditch and embankment, and afterwards conveyed one of those lots by a deed which bounded it upon the ditch generally, without any words of restriction, the Court of Errors in our sister State of Connecticut decided that the grant extended to the middle of the ditch. And Judge Daggett, in delivering the opinion of the court in that case, says: "Doubtless had the boundary line been a stone wall, six feet in width at the bottom, the grant would have extended to the centre of it." (See also 3 Kent's Com. 482.)

Although this principle exists as to the construction of grants which are unrestricted in their terms, and also as to the legal presumption of ownership by the riparian proprietor where from lapse of time or otherwise the terms of his grant from the former or original proprietors cannot be ascertained, there can be no doubt of the right of the general owner of the bed of the river, as well as of the land upon its banks, so to limit or restrict his conveyance of the one as not to divest himself of his property in the other. Lord Chief Justice Hale, in his learned treatise *De Jure Maris*, &c., admits that the *prima facie* presumption

of ownership of the bed of the stream by the riparian proprietor may be rebutted by evidence that the contrary is the fact. He says, "one man may have the river and others the soil adjacent, or one may have the river and soil thereof, and another the free or several fishing in that river." (See Harg. Law Tr. 5.) And the learned and venerable commentator upon American law says, it is competent for the riparian proprietor to sell his upland to the top or edge of the bank of a river, and to reserve the stream or the flats below high water-mark, if he does it by clear and specific boundaries. (3 Kent's Com. 434.) This was also expressly decided by Mr. Justice Washington in the Circuit Court of the United States for the Third Circuit, in the case of *Den v. Wright*, Peter's C. C. Rep. 64, where the owner of the *alveus* or bed of the creek, and also of the adjacent land upon the south bank thereof, had conveyed 29 acres in the bed of the creek, bounded by the sides of the same, without any of the land upon either of the adjacent banks. In the case of *Dunlap v. Stetson*, 4 Mason's Rep. 349, in the Circuit Court of the United States for the First Circuit, where the lands granted, instead of being bounded on the Penobscot River generally, were described as commencing at a stake and stones on its west bank, and after running on the other sides of the lot certain courses and distances to another stake and stones on the same bank of that river, and thence *upon the bank at high water-mark*, to the place of beginning, Judge Story decided, that the flats between high and low water-mark were not conveyed by the deed; although by a colonial ordinance, which was recognized as the existing law of the State, grants bounded generally upon tide waters carried the grantee to low water-mark. A similar decision was made by the Supreme Court of Massachusetts in the case of *Storer v. Freeman*, 6 Mass. Rep. 435. In that case one of the conveyances described the lines as running to the *shore* of Gamaliel's Neck, and thence *by the shore &c.* And in the other deed these lines were described as running to a heap of stones *at the shore* of the neck, and thence *by the shore* to the land conveyed by the first deed. And in the case of *Hatch v. Dwight*, 17 Mass. R. 298, the same court decided that where land was bounded by the *bank* of a stream, it necessarily excluded the stream itself. In delivering the opinion of the court in that case, Parker, C. J., says, that the owner may undoubtedly sell the land without the privilege of the stream, "as he will do if he bounds his grant by the bank."

Running to a monument standing on the bank, and from thence running *by the river* or *along the river &c.*, does not restrict the grant to the bank of the stream; for the monuments in such cases are only referred to as giving the directions of the lines *to the river*, and not as restricting the boundary *on the river*.¹ If the grantor, however, after giving the line to the river, bounds his land by the *bank* of the river, or describes the line as running *along the bank* of the river, or bounds it upon the *margin* of the river, he shows that he does not consider the

¹ So, *Luce v. Carley*, 24 Wend. 451 (N. Y., 1840).

whole *alveus* of the stream a mere mathematical line, so as to carry his grant to the middle of the river. And it appears to me equally clear that the grant is restricted where it is bounded by the *shore* of the river, as in the present case.

The shore of tide water is that portion of the land which is alternately covered by the water and left bare by the flux and reflux of the tide. Properly speaking, therefore, a river in which the tide does not ebb and flow has no *shores*, in the legal sense of the term. It has *ripam*, but not *littus*. The term "shores," however, when applied to such a river, means the river's banks above the low water-mark; or rather, those portions of the banks of the river which touch the margin or edges of the water of the stream. A grant, therefore, which is bounded by the *shore* of a fresh-water river, conveys the land to the water's edge, at low water; and, as in the case of lands bounded upon tide waters, that boundary of the grant is liable to be changed by the gradual alterations of the shore by alluvial increment, or the attrition of the water.

The fact that the premises conveyed in this case are described in the deeds as mill-lots, cannot operate to extend the grants into the *alveus* or bed of the river. For the deeds also show that the contemplated mills were to be supplied with water from the mill-race already constructed; and not by water to be taken out of the Genesee River, opposite the lots granted. And the right to discharge the water into the river, after it has been used to propel the machinery on the mill-lots, is at most but an easement; not requiring for its enjoyment the ownership of any part of the bed of the stream by the grantees. Upon the question, therefore, whether the bed of the river passed by those deeds, I concur with Mr. Justice Bronson, in the opinion given by him in the court below, dissenting from the conclusion at which his two associates on the bench had arrived.

For that reason I shall vote to reverse the judgment of the Supreme Court, and to award a *venire de novo*; to the end that the jury may ascertain the part of the premises in controversy above ordinary low water-mark, if any, which was in possession of the defendants in the court below at the time of the commencement of this suit. And if a majority of the court should concur with me in supposing that the judgment which was rendered by the Supreme Court should be reversed, it appears to be a case where the costs of this writ of error may very properly be left to abide the event of the suit upon the *venire de novo* which must then be awarded.

On the question being put, "Shall this judgment be reversed?" the members of the court voted as follows:—

For reversal: The PRESIDENT, the CHANCELLOR, and *Senators* CLARK, ELY, FRANKLIN, PECK, ROOT, SCOTT, STRONG, VARIAN, and VARNEY—11.

For affirmance: *Senators* BARTLIT, BOCKEE, DENNISTON, DIXON, HUNT, JOHNSON, NICHOLAS, PLATT, RUGER, and WORKS—10.

Judgment reversed.

SLEEPER v. LACONIA.

SUPREME COURT OF NEW HAMPSHIRE. 1880.

[Reported 60 N. H. 201.]

APPEAL, from the award of damages by the selectmen, for land taken for a highway. Facts found by referees, who awarded that the plaintiff should recover \$400 if the title of the plaintiff extended to the centre of the Winnipiseogee River. He derived his title through one Reeves from Baldwin, who was bounded by the river. The description of the land, as given in the deed from Baldwin to Reeves, and in the deed from Reeves to the plaintiff, so far as material to determine the question raised, is as follows: "thence north-westerly on the line of Baldwin's land to the river, thence north-easterly on the river shore to Church Street." When the plaintiff purchased his lot, there was between the high ground on his lot and the main channel of the river a low piece of ground covered with water. It was over this low ground that the highway was partly laid.

The referee rejected evidence offered by the defendants to show that at the time Baldwin conveyed to Reeves it was verbally agreed between him and Baldwin that the shore of the river should be the boundary of the lot; and the defendants excepted.

Hibbard and Whipple, for the plaintiff.

Jewell and Stone, for the defendants.

STANLEY, J. Baldwin once owned the premises in question. His line extended to the river, "thence on the river," &c. This gave him the soil to the thread of the stream. *State v. Gilmanton*, 9 N. H. 461; *Greenleaf v. Kilton*, 11 N. H. 580; *State v. Boscawen*, 28 N. H. 217; *Nichols v. Suncook Mfg. Co.*, 34 N. H. 345, 349; *Kimball v. Schoff*, 40 N. H. 190; *Bradford v. Cressey*, 45 Me. 9. Running the line to the river does not restrict the grant to bank or shore of the river. The river is the monument, and, like a tree, a stake, a stone, or any other monument, controls the distance, and is to be considered as located equally on the land granted and the land of the adjoining owner. The centre of the monument is the boundary, and the grant extends to that point.

These views are not controverted, but the defendants contend that the clause in the deed from Baldwin to Reeves and from Reeves to the plaintiff, "thence north-easterly on the river shore," limits and restricts the grant to the bank or shore of the river. In *Woodman v. Spencer*, 54 N. H. 507, this question was considered in respect to land bounded by a highway, and it was there held that the expressions "on the highway," and "by the side of the highway," were identical in meaning and effect; and this view is fully sustained by *Dovaston v. Paine*, 2 Sm. L. C., H. & W., notes 213, 217, 282, 284, 285, 287, 288; *Motley v. Sargent*,

119 Mass. 231; *Peck v. Denniston*, 121 Mass. 17; *O'Connell v. Bryant*, 121 Mass. 557. The rule is a presumed understanding of the parties that the grantor does not retain a narrow strip of land under a stream or other highway, because the title of it left in him would generally be of little use, except for a purpose of annoyance and litigation.

The evidence as to the agreement between Baldwin and Reeves tended to contradict the deed, and was properly excluded. *Goodeno v. Hutchinson*, 54 N. H. 159.

Judgment on the report for the plaintiff for \$400.

FOSTER, J., did not sit; the others concurred.¹

¹ Cf. *Micklethwait v. Newlay Bridge Co.*, 33 Ch. D. 133 (1886); *Norcross v. Griffiths*, 65 Wis. 599 (1886).

The ordinary rule that land on a river is bounded by the middle of the stream is not affected by the fact that the land consists of town lots. *Arnold v. Elmore*, 16 Wis. 509 (1863); *Watson v. Peters*, 26 Mich. 508 (1873).

The rules are the same on an artificial as on a natural stream. *Warner v. Southworth*, 6 Conn. 471 (1827); *Agawam Canal Co. v. Edwards*, 36 Conn. 476 (1870).

In *Lowell v. Robinson*, 16 Me. 357 (1839), a mill-dam had been constructed in a river, and land had been conveyed bounded on the mill-pond so formed. *Held*, that the grantee took to the centre of "the stream thus flowed." Cf. *Boardman v. Scott*, 102 Ga. 404, 417 (1897).

In *School Trustees v. Schroll*, 120 Ill. 509 (1887), it was held that the grantee of land bounded by a natural pond did not take to the centre, but only to the margin. Cf. *Hardin v. Jordan*, 140 U. S. 371 (1901).

In *Bradley v. Rice*, 18 Me. 198 (1886), land was bounded by a pond, which, at the time of the conveyance, was raised to an artificial height by a dam. *Held*, that the grantee was entitled to the land only to the margin as it existed at the time of the conveyance, and not as it would be in its natural state. In *Paine v. Woods*, 108 Mass. 160 (1871), land was bounded by a pond, which, at the time of the conveyance, was raised to an artificial height by a dam. For many years it had been the usage of the owners of the dam to open sluiceways therein during several months of each year, and the pond in those months was reduced to its natural state. *Held*, that the grantee was entitled to the land to the low-water mark of the pond in its natural state.

In *Halsey v. McCormick*, 13 N. Y. 206 (1855), land was bounded by the bank of a creek. The judge below charged that the bank "was that line to which the water would flow when it was ordinary high water in spring and fall." *Held*, error. The grantee was entitled to the water's edge at low water. *Murphy v. Copeland*, 68 Iowa 409 (1882), *accord*. See also *Stevens v. King*, 76 Me. 197 (1884).

On bounding "by the shore" in Massachusetts and Maine, where private ownership extends to low water, see 9 Gray, 524, note; *Dunlap v. Stetson*, 4 Mason, 349, 365 (U. S. S. C. 1826); *Litchfield v. Scituate*, 136 Mass. 39, 48 (1883).

C. On Ways.

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BERRIDGE v. WARD.

COMMON PLEAS. 1861.

[Reported 10 C. B. N. S. 400.]

THE first count of the declaration alleged a trespass on certain land of the plaintiffs. To this the defendant pleaded Not guilty; that the land was not the plaintiffs'; and *liberum tenementum*. Issue thereon. The other counts were for obstruction of private ways and a highway.

The cause was tried before *Cockburn*, C. J., at the last Summer Assizes for the County of Kent.

It appeared, that, in 1852, the plaintiffs purchased at a public auction certain land in the parish of Minster, in the Isle of Sheppy, part of a large portion of marsh land formerly the property of the late Sir Edward Banks. In the conveyance the land so purchased was described as "all those pieces or parcels of freehold land situate, lying, and being in the parish of Minster, in the Isle of Sheppy, in the County of Kent, near to the town of Sheerness, commonly called or known by the names, and containing the quantities mentioned and set forth in the schedule hereunder written, and the situations, boundaries, and numbers whereof are set forth in the plan thereof drawn on the skin of parchment annexed to these presents," &c.; and "all the pieces of land and hereditaments hereby conveyed, or intended so to be, being on the said plan colored red, together with all outhouses, edifices, buildings, hedges, ditches, fences, roadways, paths, passages, water-courses, timber and other trees, easements, commons, profits, privileges, commodities, advantages, emoluments, hereditaments, rights, members, and appurtenances whatsoever to the said pieces or parcels of land, gas-works, hereditaments, and premises, or any part thereof, belonging or appertaining."

The quantity of land sold to the plaintiffs was 11a. 9p.: and the pieces colored red on the plan contained that quantity, exclusive of the road.

The defendant in 1856 became the purchaser of another portion of the same property, and claimed to be entitled to the spot in question as part of his purchase.

It was also proved that the actual measurement of the land purchased by the plaintiffs, including the fence, but excluding the adjoining road, was 11½ acres; the measurement inserted in the schedule to the conveyance being 11a. 5p.

The question on the first count was reserved. The jury found for the plaintiffs on the other counts.

Montague Chambers, Q. C., obtained a rule *nisi* to enter a verdict for the defendant on the second and third pleas to the first count, "on

the ground that the evidence did not prove that the land on which the trespass was committed was the plaintiffs' soil and freehold, and disprove that it was the defendant's soil and freehold," or for a new trial for misdirection of the judge to the jury as to the other counts.¹

Bovill, Q. C., *Lush*, Q. C., and *Denman*, showed cause.

Montague Chambers, Q. C., and *Hannen*, in support of the rule.

ERLE, C. J. I am of opinion that this rule should be discharged. As to the first branch of it, which seeks to enter a verdict for the defendant on the second and third pleas, on the ground that the evidence failed to prove that the land on which the trespass was committed was the plaintiffs' soil and freehold, I think the counsel for the defendant have failed to sustain that point, because I am of opinion, that, where a close is conveyed with a description by measurement and color on a plan annexed to and forming part of the conveyance, and the close abuts on a highway, and there is nothing to exclude it, the presumption of law is that the soil of the highway *usque ad medium flum* passes by the conveyance. The cases cited on the part of the plaintiffs establish that.

WILLIAMS, J. I am of the same opinion; and I will only add a word as to the point of law arising on the first count of the declaration. In the case of *The Marquis of Salisbury v. The Great Northern Railway Company* [5 C. B. N. S. 174], which has been referred to, there was enough on the face of the conveyance which was set out in the special case to show that a moiety of the adjoining highway was not intended to pass. That case, therefore, is out of the general rule, which I take to be this, — that a conveyance of a piece of land to which belongs a moiety of an adjoining highway, passes the moiety of the highway by the general description of the piece of land. There is nothing in the present case to take it out of that general rule.

WILLES, J., and KEATING, J., concurred.

*Rule discharged.*²

¹ The statement of the case is condensed by omitting the part relating to the other counts; so much of the opinion as relates to them is also omitted.

² Cf. *Pryor v. Petre*, L. R. [1894] 2 Ch. 11.

"Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the centre of the thing so running over or standing on the land is the boundary of the lot granted." *Per* Gray, J., in *Boston v. Richardson*, 13 All. 146, 154, 155 (Mass. 1866).

SIBLEY v. HOLDEN.'

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1830.

[Reported 10 Pick. 249.]

TRESPASS *quare clausum fregit*.

It was agreed that the plaintiff and the defendant were once tenants in common of a farm in Barre. The conveyances to the parties included an ancient town road, two rods wide, laid out through the farm. On the 15th of February, 1826, the parties made a partition by mutual deeds of release and quitclaim. The description of a tract released by the defendant to the plaintiff was as follows: "Beginning at a stake and stones on the southerly side of a town road," &c. thence by various courses "to said road; thence by said road easterly to the place of beginning." The plaintiff released to the defendant two tracts by the same form of description. On the day when the supposed trespass was committed, the defendant went upon the southerly part of the road opposite to the plaintiff's fence on the road, the distance of four feet from the fence, and dug and carried away earth and gravel, and converted the same to his own use.

If upon these facts the court should be of opinion that the plaintiff could maintain his action, he was to recover such damages as the court should order, and costs; otherwise the defendant was to recover costs.

The cause was argued in writing by *Merrick*, for the plaintiff, and *J. Davis* and *Lee*, for the defendant.

PER CURIAM. This is a mere question of construction of the respective deeds of the parties, by which partition was made *in pais*, each releasing to the other their respective rights in the parts described in their respective deeds.

It is conceded in the argument, that if by the operation of these deeds the soil in the highway was not divided and they are still tenants in common of that soil, this action of trespass cannot be maintained. It is also conceded, that it was competent for the parties to make partition of the lands adjoining the highway, and remain tenants in common of that soil, or to include the soil of the highway in their partition, subject to the public easement, at their pleasure. It therefore remains as a question of construction upon their deeds, whether the partition did or did not include the soil of the highway. The deeds being executed at the same time, and for the manifest purpose of enabling each to hold in severalty, what they before that time held in common, it is reasonable to consider them as parts of one transaction, and to construe them together. From these deeds it appears that the parties respectively released and quitclaimed to each other, tracts of land to hold in severalty, the one upon the southerly and the other upon the northerly side of the way in question.

By these deeds, two tracts are released to one party, and one tract to the other. The description of each tract begins at a stake and stones, on the side of the town road, thence runs various courses, thence to said road, and thence by said road to the place of beginning.

From this description, we are all of opinion, that the line must begin on the side of the road, and at that point exclude the road; then the question is, whether when the description returns *to the* road again, it shall be taken to mean the side or the centre of the road. If construed to be the centre, then the remaining line would neither be by the side of the road nor the centre, but by a diagonal line from a point in the centre to a point in the side. This would not only be obscure and inconsistent with any supposed intent of the parties, but repugnant to the last clause in the description, which is, "*by said road to the place of beginning.*" As one point in this line is fixed by the description to the side of the road, we are satisfied that by a just and necessary construction, the other point must be taken to be at the side of the road, and therefore that the soil of the road was not included.

The strongest argument opposed to this construction is, that the parties intended to make partition of their entire interest. Without weighing the force of this argument if well founded, we can perceive no evidence of any such intention. There is no recital to that effect, and nothing to show that the parties did not continue to be tenants in common of other parts of the farm. Each releases to the other, his right in specific portions of the land, very particularly described. No inference can be drawn that their purpose was to divide the whole of their common property.

It is further insisted, that there could be no motive to leave the soil in the highway undivided. Without insisting upon the small value of the soil of a highway over which the public has a perpetual easement, or the popular belief, that the public are the owners of the soil of a highway, it may well be suggested, that they looked to the possibility of the discontinuance of the road as a public highway, in which case both would have an interest to secure a common right of way to their respective estates. But without particularly inquiring into motives, which could have no weight except in a doubtful case, we are satisfied, that the deeds in severalty did not embrace the soil of the highway, that of this the parties still remained tenants in common, and therefore, that this action cannot be maintained. *Plaintiff nonsuit.*¹

¹ Cf. *McKensie v. Gleason*, 184 Mass. 452 (1906).

CHAMPLIN v. PENDLETON.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1838.

[Reported 18 Conn. 23.]

THIS was an action of ejectment; tried at New London, September Term, 1837, before *Waite, J.*

The plaintiff claimed title to the demanded premises, by virtue of a deed from John Denison to him, dated April 26th, 1811, and two deeds from John Denison 2nd to John Denison, jun., one dated February 26th, 1793, and the other, October 14th, 1802; a deed from Elihu Cheesborough to Edward Denison, dated August 7th, 1753; the distribution of Edward Denison's estate, made in September, 1758; and the original survey and laying-out of a highway in Stonington, accepted in February, 1753.

The highway was thus described in the survey: "Beginning at the southerly end of a large rock, marked with the letter H, near the salt water, on the east side of Stonington harbor, on a point of land belonging to Elihu Cheesborough; then east, sixteen rods, to a heap of stones; thence north, twenty-four degrees east, eight rods; thence west, four rods, to a heap of stones; and still west, holding the breadth of eight rods, into the salt water, at the harbor aforesaid."

The deed from Elihu Cheesborough to Edward Denison described the premises thereby conveyed, thus: "Beginning at a mere-stone marked E D, and from thence running west, bounded southerly by the highway or landing, laid out by a jury, on the east side of Stonington harbor, and so running into the salt water; also from the aforesaid bound marked E D, running north, sixteen degrees east, thirteen rods and eighteen links, easterly by the highway, to a mere-stone; thence north, seven degrees east, three rods and eighteen links, by said highway to a mere-stone marked L; from thence running west into the salt water; thence to, and with, and by salt water, until an east course will bring you to the first-mentioned bound marked E D."

In the distribution of Edward Denison's estate there was "set off to John Denison out of that parcel of land that lieth on the east side of Stonington harbor, that the said Edward Denison, deceased, bought of Elihu Cheesborough, as followeth: 'beginning at a mere-stone that stands on the west side of a highway that is laid out on the east side of Stonington harbor; said mere-stone stands south-east three feet from the south-east corner of said Edward Denison's dwelling-house; from thence west till it comes to the salt water; thence back again to said mere-stone; from thence northerly, by said highway, four rods and three links, to a mere-stone; from thence west till it comes to the salt water.'"

The deed from John Denison 2nd to John Denison, jun., of the 26th February, 1793, was a release of all the grantor's "estate, right, title and interest in the one undivided half of his wharf lying at Long Point in Stonington."

The deed from the same grantor to the same grantee conveyed the other undivided half of the same premises, with covenants of warranty, &c.

In the deed from John Denison to the plaintiff the premises were thus described: "One certain lot of land lying on Stonington Point, with two stores and a wharf thereon and adjoining; beginning at a mere-stone that stands on the north side of the landing at Stonington Point; from thence west, three rods, to the salt water; from thence north to the wharf belonging to Col. Isaac Williams; from thence east, eight rods, to the street; from thence north to the first-mentioned bound; with all the privileges and appurtenances thereunto belonging."

The plaintiff claimed to have proved, that the land conveyed, by said deeds, lay north of the highway and adjoining thereto; the south line of the premises being the north line of the highway; that such highway was a public highway, seven rods, thirty-one one hundredths wide, laid out, by order of the county court, in the year 1753, and used as such until the year 1829; that in the year 1829, it was discontinued, by the county court, except twenty feet in width on the north and south side; that since such discontinuance, that part thereof, including the demanded premises, over which the highway was discontinued, had been in the possession of the defendant; and that the demanded premises were the northerly half of the discontinued part of the highway, and were bounded on the north, by that strip of the highway on the north side thereof, which was not discontinued.

The defendant claimed, that as the deeds under which the plaintiff and his grantor claimed title, did not bound the land *upon, by or along* the highway, or running *to* the highway, nor in any way mention or refer to the highway as a boundary of the land, no portion of such ancient highway, or the land over which it was laid, was conveyed, by the deeds, or either of them; and prayed the court to instruct the jury accordingly.

The court charged the jury, that if they should find, that the grantors, by such deeds, conveyed the land to the line of the highway, and did in fact bound it upon the highway, though the deeds did not contain any words bounding it *upon, by or along* the highway, or in any way mention or refer to the highway as the boundary of the lot; still the legal construction of the deeds was the same as if they contained such words, and conveyed the land to the centre of the highway.

The jury returned a verdict for the plaintiff; and the defendant moved for a new trial for a misdirection.

Isham and Cleaveland, jun., in support of the motion.

Strong, contra.

WAITE, J. In the very late case of *Chatham v. Brainard*, 11 Conn. Rep. 60, we had occasion to examine the law in relation to the ownership of highways. The different authorities upon this subject are so fully examined and considered, in the opinion given in that case, that it is unnecessary again to refer to them. We there held, that the ownership of the lands on each side of the way, furnishes *prima facie* evidence that such owner has a fee in the highway, and that strong testimony is necessary to rebut it. Whatever may have been the conflicting opinions heretofore entertained upon this subject, that rule, which is founded principally upon policy, may now be considered as fully settled, at least, in this State. And although land adjoining a highway may be so conveyed as to exclude the way; yet the inference of law is, that a conveyance of land, bounded on a highway, carries with it the fee to the centre of the road as part and parcel of the grant. An intention on the part of the grantor to withhold his interest in the road, after parting with all his interest in the land adjoining, is never presumed. It ought to appear in clear and explicit terms, so that the grantee may understand that the grantor's interest in the road is not conveyed. Judge Swift, in the case of *Stiles v. Curtis*, 4 Day, 338, says: "If it had not been universally understood that the conveyance of land adjoining a highway conveyed the right of soil in it, express words for that purpose would, long since, have been inserted in deeds."

Was the charge of the court to the jury in this case in conformity with these principles? Under it, the jury must have found, that the plaintiff by virtue of the several deeds referred to in the motion, was the owner of the land adjoining the highway. The presumption of law, then, is, that he owns to the centre of the highway. Is there anything in any one of those conveyances to rebut that presumption? We discover nothing of the kind. There is no expression to be found, indicating an intention on the part of any one of the grantors to exclude the highway.

The deed from John Denison to the plaintiff has been principally relied upon, by the counsel for the defendant, as supporting their claim. The boundaries of the tract of land there conveyed are given, and the description of the south line corresponds with the north line of the highway, as originally laid out. There is a clear intention to convey all the land north of the highway, with all the privileges and appurtenances, and nothing to show a design to exclude the road.

But it is said, there is a difference between a deed describing the land as bounded *upon*, *by*, or *along* the highway and one in which no mention is made of the road; and that in the former case, the fee of the highway will pass, but not in the latter. But we know of no such distinction. If the land conveyed is in fact bounded by a highway, it can make no difference in the legal construction of the conveyance whether the words "by the highway" are used or not. The effect in the one case, will be the same as in the other.

We are satisfied, therefore, that the instruction given to the jury was right; and that no new trial should be granted.

In this opinion the other judges concurred.

*New trial not to be granted.*¹

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BUCK v. SQUIERS.

SUPREME COURT OF VERMONT. 1850.

[Reported 22 Vt. 484.]

EJECTMENT for land in Chelsea. The suit was brought in the name of the heirs of D. Azro A. Buck, as plaintiffs, for the benefit of Sereno Allen, to whom the plaintiffs conveyed the demanded premises by deeds dated September 7, 1847, and November 11, 1847, the defendant being in possession of the premises at the time, claiming adversely to the plaintiffs. Plea, the general issue, and trial by jury, December Term, 1848, — *Redfield, J.*, presiding.

The plaintiffs proved, that the land in dispute had formerly, for more than fifteen years, been in the possession of the plaintiffs' ancestor, he claiming to hold the land in his own right, and that the plaintiffs were his heirs, and that the defendant was in possession of the premises at the date of the service of the plaintiffs' writ. The plaintiffs, in proving their title as heirs of D. Azro A. Buck, proved, that he died, in the year 1840, in the city of Washington, and that the plaintiffs were his sole surviving heirs, and that there had never been any administration upon his estate in this State. It was admitted, that there had been no division or distribution of the estate among the heirs, by the Probate Court. The defendant insisted, that the plaintiffs could not maintain this action, without showing such division and distribution; but the court overruled the objection.

The defendant gave in evidence a deed from D. Azro A. Buck to Daniel Wyman, dated September 10, 1813, describing a piece of land in Chelsea by the name of the "hop yard," and also by metes and bounds, as follows, — "beginning at the intersection of the road from Chelsea to Allen's saw mill and the branch on which the saw mill stands on the northerly side of said branch and nearly opposite my now dwelling house; thence on the easterly side of said road until the said road strikes the bank of said branch; thence down said branch, in the middle of the channel, to the first-mentioned bounds." The defendant also gave in evidence deeds of the same land, through many intermediate persons, to himself, and proved, that, as the road and the branch now run, all the land in dispute was conveyed by the deeds to the defendant. The defendant also gave evidence tending to prove, that the premises

¹ *Grant v. Moon*, 128 Mo. 48 (1894), *accord*. But see *Hoboken Land Co. v. Kerrigan*, 81 N. J. L. 18 (1864).

called the "hop yard," from a time soon after the conveyance to Wyman until the commencement of this suit, had been enclosed and occupied by the several persons to whom they had been conveyed; but that the point of land in dispute, lying in the angle of intersection between the road and the branch, at the southerly point of the same, had been for many years low and marshy and mostly unfit for use, but had been used, when sufficiently dry for that purpose, by the proprietors of the adjoining portion of the "hop yard," for the purpose of piling wood, and for other convenient uses, from time to time, until it became more dry, when the defendant erected a shop thereon; that formerly the road was travelled nearer the land in dispute, but that lately, in consequence of the bridge being placed lower down the stream, the travel had inclined more to the westerly side of the road,—but that the fence upon the west side of the road had remained where it now is for more than thirty years, and probably for more than forty years; and that during all the time after the conveyance by D. Azro A. Buck to Wyman, until the commencement of this suit, the defendant and those under whom he claims had claimed the land in dispute, as a portion of the land included in the deed to Wyman, and that, to the time of the deed from the plaintiffs to Allen, neither the plaintiffs, nor D. Azro A. Buck, had ever made any claim to the land in dispute.

The plaintiffs, for the purpose of rebutting the evidence of the defendant, offered to prove, that the land in dispute, at the time of the deed from D. Azro A. Buck to Wyman, was between the middle of the road and the middle of the stream, and that, in consequence of the stream cutting a deeper channel and the road being laid farther west in 1836, this land became suitable and convenient for use, without interfering with the road or the stream.

It was admitted, that on the tenth of September, 1818, D. Azro A. Buck owned the land on both sides of the road, and that before his death he conveyed that on the west side of the road, opposite the land in dispute. The plaintiffs also conceded, that they did not claim, that either they or D. Azro A. Buck had ever been in possession of the land sued for, since the conveyance to Wyman; but they claimed, that the possession, since that time, had been vacant.

The court being of opinion, that the deed from D. Azro A. Buck to Wyman would convey all the land to the middle of the stream and to the middle of the road, and the plaintiffs not contending, that any of this land could, on such construction, be exempted from the operation of the deed, a verdict was taken for the defendant, and the plaintiffs excepted to the decision of the court.

Hebard and Martin, for plaintiffs.

L. B. Vilas and C. W. Clark, for defendant.

The opinion of the court was delivered by

POLAND, J. The first question made in this case arises upon the defendant's objection, that this action cannot be sustained by the present plaintiffs, because there has been no decree made by the Probate

Court, directing a division of the estate among the several heirs entitled to it; and the case of *Boardman v. Bartlett*, 6 Vt. 631, is relied upon, to sustain the objection. That case arose and was decided under the Statute of 1821, which expressly prohibited heirs and devisees from maintaining actions of trespass, or ejectment, for lands of the testator, or intestate, until such estate shall be set off to them by order of the Probate Court. The Revised Statutes of this State do not contain any such prohibition, and indeed no prohibition whatever, except in cases where there has been an administrator or executor appointed, who has assumed the trust of administering upon the estate. See Rev. St., p. 269, sect. 11. By the common law, upon the death of the ancestor the title immediately descended to and vested in the heir, and he was the proper party to bring an action for any injury to the realty; and as this case is clearly not within any of the prohibitions contained in the Revised Statutes, this objection of the defendant cannot be sustained and was properly overruled by the County Court.

Another and much more important question is raised in the case upon the construction of the deed from D. Azro A. Buck to Daniel Wyman, dated September 10, 1813, as to the extent of the boundary line of the premises conveyed, and especially, whether any part of the road, or highway, mentioned in said deed, is to be considered as included within the description of the land conveyed.

There has been much discussion in this country, both by the courts and elementary writers, in relation to the rules, which should govern in the construction of deeds and grants of lands lying upon or bounded by highways, or streams not navigable; and the most perfect harmony has not prevailed among the various decisions of courts and opinions of law writers upon this subject. The following general principles, however, seem now to be pretty well established. That where one owns land adjoining to or abutting a highway, the legal presumption is, in the absence of evidence showing the fact to be otherwise, that such land owner owns to the middle of the highway;—so, also, where one conveys land adjoining to or bounded upon a highway (of which the grantor owns the fee), the law presumes the party intended to convey to the middle of the highway, and will give the deed such an effect, unless the language used by the grantor is such, as to show a clear and explicit intent to limit the operation of the deed, or grant, to the *side*, or *outer edge*, of the highway. And in all cases, where general terms are used in a deed, such as “to a highway,” or “upon a highway,” or along a highway, the law presumes the parties intended the conveyance to be to the middle or centre line.

The doctrine has sometimes been advanced, that where land was conveyed, which abutted upon a highway, though by a description which did not include any part of the highway itself, yet the grantee would take to the middle of the highway, upon the principle, that the highway would pass as *appurtenant* to the adjacent land. This doctrine seems now, however, to be very justly and generally exploded. The owner of

the fee of the land, upon which a public highway is located, has not a mere easement in the land, which might pass as a mere *appurtenant*; but he is considered as still the real owner of the soil and freehold in the land, and entitled to the use and possession of it, so far as it can be used, or occupied, without detriment to the rights of the public to use it for a highway; and he may maintain trespass, or ejectment, even, against any other person, who commits an injury upon the soil, or makes an erection upon it.

The true reason, why this doctrine cannot be sustained, is well stated by Platt, J., in giving judgment in the case of *Jackson v. Hathaway*, 15 Johns. 447. He says: "A mere *easement* may, without express words, pass as an incident to the principal object of the grant; but it would be absurd to allow the fee of one *piece of land*, not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted by precise and definite boundaries." And the law is laid down in nearly the same language by Wilde, J., in delivering the opinion of the court in the case of *Tyler v. Hammond*, 11 Pick. 193, and by Morton J., in the case of *O'Linda v. Lathrop*, 21 Pick. 292; and we are not aware, that this doctrine is now held, *in terms*, by any court in England, or in this country.

The question, then, whether, in a conveyance of land abutting upon a highway, the highway is included and passes to the grantee, or whether it is excluded and does not pass, becomes in all cases a matter of construction and intention merely, from the language used by the parties, and such surrounding circumstances, as are proper to be taken into the account in ascertaining the intentions of the parties, — keeping always in view the legal presumption, that the parties intended to include the highway, and that the burden is upon the party, who assumes to show, that the parties intended the contrary.

From the plan, referred to in the bill of exceptions in this case, it appears, that the piece of land conveyed by D. A. A. Buck to Wyman was a narrow strip of land, lying between the road and the branch, terminating at the south end in a sharp point, at the intersection of the road and the branch, the road there crossing the branch diagonally; and the main question seems to be in this case, as to the starting point mentioned in the deed. The plaintiffs claim, that it is at the intersection of the northern, or western, bank of the branch and the eastern edge, or side, of the highway. The defendant claims, that by a proper construction of the deed the point of intersection is where the centre line of the branch and the centre line of the road intersect, — which is several rods farther south than the point claimed by the plaintiffs. The land in dispute is between these two points.

If the position of the plaintiff, as to the point of beginning, in the description of the premises in the deed, were admitted to be correct, it would not be important to inquire, whether any part of the highway was included in the premises conveyed, or not, as we think, if the centre of the road were the boundary intended, it would have to be reached by a

direct line from the starting point, and thus the land in dispute not be covered by the deed. But as the whole description is to be taken together, in order to ascertain the intent of the parties, and the proper determination of the place of beginning may be materially affected by the construction given to the deed in this particular, we have examined the case in reference to the question, whether the land conveyed goes to the centre of the highway, or only to the eastern side, or edge, thereof.

It may be proper here to notice some of the leading decisions in similar cases; though in cases, where we are merely seeking the intent of the parties from the language they have used, not very much aid can be obtained from authorities, except where the very same language is used. In the case of *Jackson v. Hathaway*, 15 Johns. 447, it was held, that, where land was conveyed, and bounded upon the *side* of a road, no part of the highway passed by the deed. In the case of *Sibley v. Holden*, 10 Pick. 249, tenants in common owned land lying upon both sides of a highway, and executed mutual deeds to make partition of their land; and in the deeds the land was described as beginning at a stake and stones on the *side* of the road, thence, by various courses, to said road again, thence by said road to the place of beginning; and it was decided, that no part of the road was included in the conveyance, but that it still belonged to both, as tenants in common. In *Tyler v. Hammond*, 11 Pick. 192, a piece of land was conveyed by certain metes and bounds, and was also described as bounded upon one side of a road; and it was held, that no part of the road passed by the deed, it not being included within the metes and bounds given by the deed.

The following cases were conveyances of land bounded upon streams not navigable; and all authorities seem to agree, that the law is the same in relation to such waters, as in the case of highways. 8 Kent, 432, and notes. In the case of *Albee v. Little*, 5 N. H. 277, it was held, where a deed of land described it as beginning at a river, and then the line was particularly described, until it came to the river again, and was then described as running "on the southerly and easterly bank of said river to the bound first mentioned," that the conveyance did not extend to the centre of the stream, but only to the side, or bank. *Hatch v. Dwight et al.*, 17 Mass. 289, the description of the land was, "Beginning at the west end of the dam on Mill River, at the upper mills, so called, thence running up the river two rods, thence westwardly, &c., thence to the bank of the river," — and it was held, that the words used clearly excluded any part of the stream.

The defendant relies mainly upon the following cases: — *Chatham v. Brainard*, 11 Conn. 60, where the land was described by courses and distances, and was also described as bounded *easterly on the highway*, and it was held, that the deed extended to the centre line of the road; though considerable stress seems to be laid upon the fact, that it did not appear clearly, that, by the courses and distances as given, the road was excluded. In the case of *Champlin v. Pendleton*, 13 Conn.

23, land adjoining a highway was conveyed by metes and bounds, without mentioning the highway; but it being made to appear, that the south line of the land and the north line of the highway were the same, it was held, that the conveyance extended to the middle of the highway. In the case of *Starr v. Child et al.*, 20 Wend. 149, the deed described certain premises by a line *running to the river, thence along the shore of said river to a certain street*; and it was held by a majority of the Supreme Court of New York, that the grantee took to the middle of the river. This case was afterwards carried up and decided by the Court of Errors in that State, and the judgment of the Supreme Court was reversed, and it was held, that the grantee only took to low water-mark, and that no part of the bed of the river was included in the deed. 4 Hill, 369.

To return, then, to the language of the deed in this case: — “Beginning at the intersection of the road from Chelsea village to Allen’s saw mill and the branch on which the saw mill stands on the northerly *side* of said branch and nearly opposite my now dwelling house, thence on the *easterly side* of said road, until the said road strikes the bank of said branch, thence down said branch in the middle of the channel to the first-mentioned bound.” The land is described as bounded on the west by a line running on the *easterly side* of the highway; — now upon what ground can it be fairly said, the parties intended, by the *easterly side*, the *centre line* of the highway? The language, as commonly used and understood, certainly does not import that; and it seems to us, that when the case is viewed in the light of the authorities upon the subject, the great majority of them are against giving this deed such a construction, as the defendant claims for it. The case in 18 Conn. is an authority sufficiently strong to sustain the defendant’s view; but that case is directly at variance with the case in 11 Pick., and, as it seems to us, cannot be sustained upon the principle established, even in Connecticut, that the highway must come within the description and cannot pass as appurtenant merely.

Where, then, is the starting point in the deed? In the first place it is to be on the northerly *side* of said branch, and, as we understand the terms used, they must refer to the *bank*, and not to the centre or thread of the stream. The line leading from this point is to follow the *easterly side* of the highway, which, as already stated, in our opinion, is to be construed to mean the eastern edge, or *line*, of the road, and not the *centre line* of the road. We come to the conclusion, therefore, from the language used in this deed, that the true starting point is at the intersection of the northerly *bank* of the stream and the *eastern side*, or edge, of the road, and that no land lying south of that point was intended to be conveyed by the deed; and also that no part of the highway was intended to be included in the deed.

The judgment of the County Court is therefore reversed and a new trial granted.

REDFIELD, J., dissenting. The importance of this case to the imme-

diate parties would hardly justify me in making a formal dissent from the opinion of the court; and could I feel any assurance, that the decision made in this case will not hereafter be regarded, as having virtually set aside the well settled rule of law, that land bounded, by deed, or other conveyance, upon a fresh water stream, not navigable, or by the side of a highway, is to be regarded as extending to the centre of such boundary, I would surely not occupy the time of the court, or space in the reports, by making any dissent from the judgment of the court in this case.

But if I comprehend that rule, and also its application to the facts of this case, it must be regarded, hereafter, as virtually abrogated, in this State, for all useful purposes. The rule itself is mainly one of policy, and one which to the unprofessional might not seem of the first importance; but it is at the same time one, which the American courts, especially, have regarded as attended with very serious consequences, when not rigidly adhered to; and its chief object is, to prevent the existence of innumerable strips and gores of land, along the margins of streams and highways, to which the title, for generations, shall remain in abeyance, and then, upon the happening of some unexpected event, and one, consequently, not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up, to vex and harass those, who in good faith had supposed themselves secure from such embarrassment.

It is, as I understand the law, to prevent the occurrence of just such contingencies as these, that, in the leading, best reasoned and best considered cases upon this subject, it is laid down and fully established, that courts will always extend the boundaries of land, deeded as extending to and along the sides of highways and fresh water streams, not navigable, to the middle of such streams and highways, if it can be done without manifest violence to the words used in the conveyance. And to have this rule of the least practical importance to cure the evil, which it is adapted to remedy, it must be applied to every case, where there is not expressed an *evident* and *manifest* intention to the contrary,—one from which no rational construction can escape. The rule, to be of any practical utility, must be pushed somewhat to the extreme of ordinary rules of construction, so as to apply to all cases, when there is not a clearly expressed intention in the deed to limit the conveyance short of the middle of the stream, or way. If it is only to be applied, like the ordinary rules of construction as to boundary, so as to reach, as far as may be, the clearly formed idea in the mind of the grantor at the time of executing the deed, it will ordinarily be of no utility, as a rule of expediency, or policy. For in ninety-nine cases in every hundred the parties, at the time of the conveyance, do not esteem the land covered by the highway of any importance, either way; hence they use words naturally descriptive of the prominent idea in their minds at the time, and, in doing so, define the land, which it is expected the party will occupy and improve. This is the view taken

by Wallace, in the American notes to *Dovaston v. Payne*, 2 Smith's Leading Cases, 90, where the cases upon this subject are collated and compared.

The general rule as to monuments undoubtedly is, that the centre of such monuments, stake, stone, tree, rock, &c., is intended, when lands are so defined. So, also, in regard to highways and streams, when referred to in deeds as the limits of the grant, or conveyance, the middle is to be presumed to be the limit, unless the contrary be clearly expressed. The real boundary, then, is the belt of land extending along the highway, or stream, between the margin and centre. And this will ordinarily be referred to, as extending to the road, or the stream, as to a wall, or stone, or tree, &c., — the intention being to convey one half of the monument.

But if land be bounded, as extending to other land of the grantor, or along another strip of land, ever so narrow, owned by the grantor, it will be supposed the margin of the land is intended. *Seventeenth Street*, 1 Wend. 262. *Lewis Street*, 2 Ib. 472. *Livingston v. Mayor of New York*, 8 Ib. 85. But in this case there is no ground to suppose, that the party, while describing one piece of land, intended to convey half of another piece, as appurtenant to it. Land cannot be conveyed, as appurtenant to other land; if conveyed at all, it must be as parcel of the land conveyed. And it is this rule, which the Massachusetts courts have attempted to apply to the case of lands bounded along the side of a highway. *Tyler v. Hammond*, 11 Pick. 94. *Webber v. Eastern Rail Road Co.*, 2 Met. 147. The Massachusetts courts, too, have repudiated Chancellor Kent's view, — 3 Kent, 483, — *in toto*. But if anything whatever is attempted to be made out of the rule, beyond mere show, the reasoning of the Chancellor is the only ground, upon which it can stand, that is, to treat it as a rule of policy merely (and not one of intent chiefly), to be applied to all cases, where there is not a clearly defined intention to the contrary.

This rule we find fully adopted in two elaborate and well considered cases in Connecticut, — *Chatham v. Brainard*, 11 Conn. 60, and *Champlin v. Pendleton*, 13 Conn. 23. The same rule is now fully established in New York, both as to highways and streams, putting them both upon the same ground: *Starr v. Child*, 20 Wend. 149; *Canal Commissioners v. People*, 5 Wend. 423; s. c. 13 Wend. 355; and this notwithstanding the decision in *Starr v. Child* was reversed by the Court of Errors [4 Hill, 369], by a vote of eleven to ten, — the vote constituting the majority being perhaps that of some senator, who had acquired his knowledge of law in a counting room or upon a canal boat. The New York courts have repeatedly refused to regard the decision of their Court of Errors as evidence of the law, in that State even, except as to the particular case; and it has never been regarded elsewhere as much evidence of the law of any case. This same rule has been adopted in many of the other American States. It only remains to inquire, how far it applies to the present case.

It seems to me, that there is no difficulty in applying the terms used in this conveyance in the manner for which I contend. The place of beginning is "the intersection of the stream and the highway on the northerly side and nearly opposite my now dwelling house." The mention of the dwelling house of the grantor is evidently referred to, to show in what vicinity the "intersection" is, — not to fix any particular point, as the point of beginning. The term is not the *point* of intersection, but the intersection of the whole stream and the whole highway. The northerly side of the stream is named, not to fix any starting *point*, but to show upon which side is the land, as the grantor owned land upon both sides, and the intersection was upon both sides. And it is evidently not a point upon the bank, which was intended to be fixed as a starting point, as the returning line of the circuit is expressly defined to be in the middle of the stream and to return to the "first mentioned bound," — which would be impossible and absurd, if the bound were upon the bank of the stream. And every contract should be so construed, as to give every portion its just operation, when that can be done. "Thence on the easterly side of said road" is wholly consistent with the rule, for which I contend, and with the decided cases upon this subject. "Until said road strikes the bank of said stream" comes next; and it does not seem to me, that there is any difficulty with this, upon the view I take of the case. If the side of the road means one half of it, and so of the bank of the stream, then when they come in contact it answers the call. And it is evident, the term *bank* is here used in the precise sense, for which I contend, as the description proceeds, "Thence" (that is, from the bank) "down said branch, in the middle of the channel, to the first mentioned bound."

Now I submit, that the language of this description in general, as to the terms used, *more strongly* indicates an intention only to go to the margin of the stream, than it does to the margin only of the road, aside from the *express provision* in regard to the easterly *side* going to the *middle* of the channel. The ends of this line are defined to be on the "northerly side of the stream" and "the bank of said branch," and yet the line between these two monuments is expressly defined to be "in the middle of the channel;" thus showing, that the other terms are used to imply an extension to the "middle of the channel." Why, then, it may be asked, shall we not hold, that, "the easterly side of said road" means the easterly half of said road, as well as of the stream. It does seem to me extremely difficult to escape from this conclusion by any satisfactory reasoning, which does not, at the same time, subvert all the leading cases upon this subject, and, in effect, overthrow the rule itself.

The consideration, too, that the ancestor of the plaintiffs had never made any claim to this land for more than twenty or thirty years, and had no suspicion of any such title remaining in him, goes very far, in my mind, to corroborate the view, which I have taken of the case. For these reasons I cannot concur with the decision of the court.¹

¹ *Paul v. Carver*, 26 Pa. 223 (1856), *contra*.

BANGOR HOUSE PROPRIETARY v. BROWN.

SUPREME JUDICIAL COURT OF MAINE. 1851.

[Reported 33 Me. 809.]

SHEPLEY, C. J.¹ An aqueduct, owned by the plaintiffs, appears to have passed through a street, formerly called Centre Street, in front of the defendant's dwelling-house, nearer to it than the centre of the street, and about six feet below the surface of the earth.

A lot of land numbered seventeen, a part of which constitutes the defendant's house lot, was conveyed by the owners to Elliott Valentine, on September 28, 1832, bounded "southerly on Centre Street, there measuring one hundred and twenty feet," "as the same is laid down on a plan drawn by Zebulon Bradley, in December, 1829." The title of the defendant is derived from Valentine.

The owners of land, including this lot, caused Bradley to draw a plan thereof in December, 1829, and to designate upon it building lots and streets. They soon afterwards caused Centre Street to be prepared for use as a street or way.

As the law has been established in this State, when land conveyed is bounded on a highway, it extends to the centre of the highway; where it is bounded on a street or way existing only by designation on a plan, or as marked upon the earth, it does not extend to the centre of such way.

The occasion of such difference in effect may be ascertained. The owner of land, who has caused it to be surveyed and designated as containing lots and streets, may not be able to dispose of the lots as he anticipated, and he may appropriate the land to other uses; or he may change the arrangement of his lots and streets to promote his own interest, or the public convenience in case the streets should become highways. He does not by the conveyance of a lot bounded on such a way hold out any intimation to the purchaser, that he is entitled to the use of a highway to be kept in repair, not at his own, but at the public expense, for the common use of all. While he does by an implied covenant assure to him the use of such designated way in the condition in which it may be found, or made at his own expense. By a repurchase of that title, the former owner would be entitled to close up such way, as he would also by obtaining a release of the right of way.

There is no indication in such cases of an intention on the part of the grantor to dispose of any more of his estate than is included by the description, with a right of way for its convenient use.

When a lot conveyed is bounded on a highway expected to be permanent, the intention to have it extend to the centre of it is inferred, (among other reasons noticed by this court in former cases,) from the consideration that the vendor does not convey or assure to the vendee

¹ Only the opinion is given.

a right of way, the law affording him in common with others a more permanent and safe public way, to be kept in repair at the public expense. The vendor not being burdened by an implied covenant, that the vendee shall have a right of way, has no occasion to retain the fee of the highway for that purpose. Hence arises one motive inducing him to convey all the rights, which he can convey to land covered by the highway.

In argument for the defendant it is insisted, that Centre Street at the time of the conveyance had become a highway by dedication of the owners of the land.

It might be sufficient to observe, that such a position does not appear to have been presented at the trial, for decision by the jury or for instruction by the court.

Without insisting upon this, the testimony presented in the bill of exceptions does not sustain the position.

If an owner of land should cause it to be surveyed into lots and streets, and a plan thereof to be made, and should also cause the streets to be made convenient for use, and continue to keep the land enclosed as his own property, it would not be contended, that a dedication of it to the public could be inferred from these acts. There must be some act of the owner, from which it can be clearly inferred, that he intended to surrender it for public use, and not for the use of certain persons only. The simple facts, that a person pursued such a course respecting his land, and that he opened a way for the use of a purchaser of a lot, would not, alone considered, authorize an inference that it was dedicated to the public for common use. There should be some evidence, that it was generally used with his knowledge, as public convenience might require, to authorize such a conclusion. Nor could the owner compel the public to accept and adopt such streets as highways. There should be evidence that they had been commonly used to authorize an inference, that they had been accepted as public ways.

In this case, there is not only no evidence that Centre Street at the time of the conveyance of the defendant's lot to Valentine had been used as a public way, but there is evidence, that it was not kept in repair, and that part of it only is used as a street.

Exceptions overruled, and judgment on the verdict.¹

McCrillis and Crosby, for the defendant.

Rowe and Bartlett, for the plaintiffs.

¹ Cf. *Sutherland v. Jackson*, 32 Me. 80 (1850).

FISHER v. SMITH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1857.

[Reported 9 Gray, 441.]

ACTION of tort for breaking and entering the plaintiff's close in Dedham, and cutting down trees and digging up and carrying away the soil.¹

At the trial in the Court of Common Pleas at December Term, 1855, before *Byington, J.*, it appeared that the *locus in quo* was a strip, two or three rods wide, of land conveyed to the plaintiff on the 16th of July, 1844, and had been used time out of mind as part of a road or passage-way leading from the old Providence road, now called Walpole Street, northwesterly to the plaintiff's dwelling-house, and to wood-lots and pasture of other persons using the way.

The defendant justified the acts complained of under a claim of ownership in the fee of the way, westerly of the centre thereof, under a deed from the plaintiff to him dated July 16th, 1844, of "a certain tract of land situated in the South Parish of said Dedham, containing five acres, more or less, bounded easterly on the road or leading way from my dwelling-house to the old post road, so called; southerly, on said old post road," &c. The court ruled that this deed conveyed to the defendant the fee in the land to the centre of said road or leading way, subject to the right of way of the plaintiff and others, as aforesaid; and ordered a verdict to be rendered for the defendant.

It was admitted that the acts of trespass complained of were done westerly of the centre of said way, between the travelled part of said way and said wall, row of stones, and stake and stones.

A verdict was returned for the defendant, and the plaintiff alleged exceptions.

W. Colburn, for the plaintiff.

E. Wilkinson, for the defendant.

By THE COURT. The rule is well settled in this Commonwealth, that a deed of land bounded on a highway laid out over land of the grantor passes the fee to the centre of the way, where there is nothing in the deed to require the opposite construction. A majority of the court are of opinion that the same rule extends to private ways.²

¹ Part of the case is omitted.

² See *Morgan v. Moore*, 8 Gray, 319 (Mass. 1855); *Codman v. Evans*, 1 All. 443 (Mass. 1861); *Stark & Wales v. Coffin*, 105 Mass. 323 (1870); *Clark v. Parker*, 106 Mass. 554 (1871); *Motley v. Sargent*, 119 Mass. 231 (1875); *Gould v. Eastern R. R. Co.*, 142 Mass. 85 (1886). But cf. *Mott v. Mott*, 68 N. Y. 246 (1877).

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BISSELL v. NEW YORK CENTRAL RAILROAD COMPANY.

COURT OF APPEALS OF NEW YORK. 1861.

[Reported 23 N. Y. 61.]

APPEAL from the Supreme Court. Action to recover the possession of land in the city of Rochester. The plaintiffs claimed title under William W. Mumford. Upon the trial it was proved that, in 1825, Mumford was the owner of one half of a block of land in the city of Rochester, including the premises in controversy, which tract was surrounded on all sides by streets opened and used as public highways. He caused his portion of the block to be surveyed and subdivided into lots, and a map to be made representing such lots as abutting upon a street extending from Kent Street, one of the boundaries of his tract, through the centre thereof, and also through the land of adjoining proprietors, to Jones Street. This proposed avenue was designated on the map as Erie Street, and that part of it within Mumford's allotment was the land in controversy in this action. Mumford proceeded to sell, and did sell, all of his lots, by deeds, describing them according to their number upon his map, in this manner: "Lot No. 1, section G, according to allotment and survey of part of Frankfort [a portion of Rochester including Mumford's tract], made by Elisha Johnson; said subdivision being thirty-three feet front and rear and seventy feet deep:" but without any mention of or reference to said street by name. Mumford's grantees entered upon such lots and built thereon, and the strip denominated as a street was used by them for access to their lots, and was opened so far as Mumford's land extended; but was not opened through the other half of the block to Jones Street. It did not appear that the owner of the other half of such block plotted his ground into city lots, or in any way assented to the opening of a street through the same; and a fence was kept up by him between his portion of such block and that of Mumford. The defendant acquired all the rights of the several grantees of lots from Mumford, and was in occupation of the same and of the land between, designated as Erie Street, which it had covered with a warehouse and other structures. The judge, under exception by the defendant, directed the jury to find a verdict for the plaintiffs. The judgment entered thereon was affirmed at General Term in the Seventh District, and the defendant appealed to this court.

Henry R. Selden, for the appellant.

Theron R. Strong, for the respondents.

MASON, J. The question presented for adjudication in this case is, whether the several deeds of conveyance executed by William W. Mumford, between the years 1828 and 1845, to different individuals, conveying lots on either side of Erie Street, in the city of Rochester, carried the lands to the centre of that street. These deeds describe the lots invariably by their numbers; "reference being had to the allot-

ment and survey made by Elisha Johnson." In some cases the size of the lot is given: "being thirty-three feet front and rear, and ninety-nine feet deep." There is no express mention of any street in any of the deeds. It appears that, before selling any of the lots, Mr. Mumford, the original proprietor of these lands, placed his map, or a copy of it, in the hands of agents engaged in selling his lots, and that they made sales in reference to the map. On this map the lands in controversy are laid down as "*Erie Street*;" and these lots conveyed lie both on the north and south sides of "*Erie Street*." The simple question, then, is, whether a conveyance of a lot bounded on a piece of ground thus laid out upon the map as a street, and called a street, but which is not, in fact, a public street or highway, carries the grantees to the middle of the street. The question, so far as it is here presented, involves merely the construction to be given to these deeds. The inquiry is as to the extent of the grant.

If the rule of construction in regard to such grants is not to be considered as settled in this State, I am inclined to hold that the inference of law is, that such a conveyance carries with it the fee to the centre of the street, as part and parcel of the grant. There is no more reason, it seems to me, to infer an intention in the grantor to withhold his interest in or title to the land covered by the street, after parting with all his right and title to the adjoining land, than there is in the case of a deed bounded by a public highway.

I have not been able to discover any reason which can be given in the one case, which is not equally applicable to the other. The rule of construction is well settled in regard to a deed bounded by a public highway. The established inference of law is, that a conveyance of land bounded on a public highway carries with it the fee to the centre of the road as part and parcel of the grant. 2 J. R. 363; 15 Id. 452; 1 Cow. 240; 3 Kent's Com. 433, 3d ed. The rule seems to be based upon the supposed intention of the parties, and, it seems to me, upon a very reasonable intention. The idea of an intention in a grantor to withhold his interest in a highway to the middle of the street, after parting with all his right and title to the adjoining land, ought never to be presumed; and all the cases hold that, in such a case, it requires some declaration of such an intention in the deed to sustain such an inference. There is no reason for presuming a different intention in a case like the present. The grantor, Mumford, intended this as a street, and gave it the name of *Erie Street*, and, as regards his grantees in these deeds, he dedicated it as a street, according to all the cases, whether the public ever accepted it as such or not. It was, as between him and his grantees, a street which they had a right to use as such, as soon as these conveyances were made by him. 1 Wend. 262, 427; 2 Id. 472; 8 Id. 85; 11 Id. 486; 17 Id. 650; 18 Id. 411; 19 Id. 128; 1 Hill, 189. As regards the public generally, I admit it does not become a public highway until there has been an acceptance, either by formal act of the public authorities, or by common user under such circumstances

as show an intent to accept it. *Holdane v. The Trustees of the Village of Cold Spring*, 21 N. Y. 474. This does not, in any manner, as I can perceive, affect the matter as between this grantor and his grantees. As between them and him, his conveyances, *per se*, dedicated it to their use as a street. I do not see, then, how, as regards these grantees, Mumford can be allowed to say it is not a street.

This being so, the rule of construction which should be applied to his conveyances is the same as if it were a public street, as regards the public generally. If, as regards these grantees, it is a street, and if, in his conveyances, he intended it as a street, as all the cases hold he did, I am not able to see why the legal inference, as regards his conveyance, is not the same as if it were a public highway. There is no more reason to presume the intention in the grantor in such a case to withhold his interest in the road to the centre of it, after conveying all his right and title to the adjoining lands, than there would be were this to all intents and purposes a public street. The question in each case becomes one of presumed intention arising upon the conveyance itself; and I am not able to perceive how it is possible to deduce a different intention in one case from that which, the law has settled, shall be inferred in the other. Did not Mumford when he caused these lots to be laid out on either side of this street, and this street designated, named, and put down on the map, and these lots numbered, and when he conveyed these lots to purchasers with a reference to this allotment and survey, intend that this should be a street, by the name of Erie Street? No one will pretend that he did not. Did he not, by selling these lots to purchasers with reference to this map and street, and conveying the lots to them on both sides of the street, thereby, so far as these grantees are concerned, dedicate this as a street? No one can claim to the contrary. All the cases affirm it. Did he not, then, in making these conveyances to these purchasers, intend to convey lands upon a street, so far as the grantees in these deeds are concerned, and did not these purchasers so understand it? No one can doubt it for a moment. If such was the intention of the parties to these conveyances, then I am not able to perceive why the conveyance does not carry with it the usual legal inference that a conveyance bounded by a highway does, to wit, that it carries with it the fee to the centre of the road.

I certainly am not able to discover any more intention in the grantor to withhold, in these conveyances, his interest in the land covered by this street, than would be if the public authority had already laid out the street, and the grantor still held the fee subject to the easement. As between these parties, grantor and grantees, it is a public street to all intents and purposes, except that the public authorities are not bound to keep it in repair. It is made such by Mumford himself, in laying out the street and putting it upon his map, and selling these lots upon either side of it with reference to the map and street; and he has probably received the full value of the street in the increased price of the lots sold upon the street. 1 Hill, 190; 1 Sandf. 323, 346, 347; 17

Mass. 415; 4 Cush. 332; 8 Wend. 99; 17 Id. 661; 6 Pet. U. S. 438. If the views above expressed are correct, it follows that we must hold that these conveyances by Mumford carried the fee to his grantees to the centre of this street, unless this court shall feel constrained, in deference to the authority of the New York city street cases, to come to a different conclusion.

I have looked carefully into these cases, of which there are ten in number, and may be found in our reports, as follows: 4 Cow. 542; 1 Wend. 262; 2 Id. 472; 8 Id. 85; 11 Id. 486; 17 Id. 650; 18 Id. 411; 19 Id. 128; and 1 Hill, 189.

It cannot be denied that these cases seem to assume that a different construction should be put upon such conveyances in city lots bounded by a projected street. It is proper to remark, however, in regard to these cases, that they all arose on applications to the Supreme Court to set aside or confirm, assessments of damages on opening streets; and the question as between grantor and grantees does not seem to have been much considered. The discussion seems principally to have gone upon the question whether the city should pay the full value of the lands on the ground that there was no dedication, or whether they should pay merely a nominal sum on the ground that there was a dedication of the street; and the court sustained the latter view.

Three of these cases were removed by writ of error to the Court for the Correction of Errors. In the first of those cases, *Livingston v. The Mayor of New York*, 8 Wend. 85, the Supreme Court had only awarded nominal damages to Livingston, and he having brought error, the court affirmed the judgment of the Supreme Court. As the corporation had acquiesced in the judgment of the Supreme Court, the question whether Livingston, having parted with his title, was not entitled to any damages, was not before the court; and this case, therefore, so far as the court of dernier resort is concerned, decides nothing as regards the question of title between grantor and grantee.

In the second case, *Wyman v. The Mayor, &c., of New York*, 11 Wend. 486, the case came before the Court for the Correction of Errors precisely in the same manner, and the same question, and no other, was presented to that court; and the only question was, whether the grantor was entitled to more than nominal damages, and not whether he was entitled to that, for the city had acquiesced in the judgment of the Supreme Court, and they could not say, therefore, that the judgment for nominal damages should be reversed.

In the third case, which was that of *Champlin v. Laytin*, 18 Wend. 411, the question under consideration was in no respect adjudicated by the Court of Errors; and all that was decided in that case is perfectly consistent with the view that the grantee in such cases takes to the centre of the street.

There is another consideration which should be taken into account in considering whether these cases are to be regarded as controlling authority upon the question before us, and that is, the grantee was not a

party to the proceedings, and did not have his day in court to contest the issue; and, besides, those cases were not adjudged in a plenary suit or action at law. The cases came before the court in a summary way, upon application to confirm, or set aside, the assessments, and ought not to be regarded as so high evidence of the law as judgments of the court pronounced after a full trial in an action according to the course of the common law. There is another, to my mind, very objectionable feature to these street cases, that is, they seem to have inculcated the idea that there was a different rule of construction to be applied in such cases to a deed of land in a city from what there is to such a deed in the country. Such a doctrine I affirm has no foundation in principle, and will not, I apprehend, find any favor with this court. These cases were most severely criticised by the distinguished counsel who argued for the defendant in *Hammond v. McLachlan*, 1 Sandf. 323; and the Superior Court held these cases were not controlling authorities in that court upon the question under consideration. The same was again held in *Herring v. Fisher*, 1 Sandf. 344, and in the case of *Stiles v. Curtis*, 4 Day, 328, the Supreme Court of Connecticut held, in a precisely similar case to this, that the conveyance carried the fee to the centre of the street. It seems to me, in view of these considerations, that this court cannot be considered as constrained by anything said in these New York street cases from fully considering the question presented, upon its merits, and deciding it according to the real intent of the parties; and it seems to me that, for the reasons above, as well as for the reasons stated by Judge Oakley in *Hammond v. McLachlan*, that the judgment of the Supreme Court should be reversed and a new trial granted.

DENIO, DAVIES, JAMES, and HOYT, JJ., concurred; SELDEN, J., expressed no opinion; COMSTOCK, C. J., and LOTT, J., did not sit in the case.
Judgment reversed, and new trial ordered.

WHITE v. GODFREY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1867.

[Reported 97 Mass. 472.]

TORT for cutting off limbs of an elm tree on Summer Street in Taunton.¹

At the trial in the Superior Court, before *Morton*, J., it appeared that the plaintiff acquired a lot of land on that street, by a deed in which the description was as follows: "A certain tract of land situate at the Neck of Land, so called, in said Taunton, on the northerly side of Summer Street, bounded and described as follows: beginning at a point on the line of Samuel Blake's land; thence by said street north fifty-eight and three quarters degrees west, about one hundred feet, to

¹ Part only of the case is given.

a stake and stones at the corner of Job Godfrey's land; thence north thirty-one and a quarter degrees east, to the river; thence by said Blake's land to the first mentioned bound." By other deeds introduced in evidence, it appeared that the plaintiff's grantor owned the fee to the centre of the street.

The defendant asked the judge to rule that the plaintiff did not own the fee to the centre of the street; but the judge directed a verdict for the plaintiff, the parties agreeing upon the amount of damages, if the plaintiff was entitled to recover; and the defendant alleged exceptions.

E. H. Bennett, for the defendant.

J. H. Dean, for the plaintiff.

FOSTER, J. We entertain no doubt that the plaintiff owned the land to the centre of the street. By the doctrine now established, such is the presumption wherever a deed bounds an estate by or on a public or private way, unless a contrary intent appears on the face of the instrument. *Boston v. Richardson*, 18 Allen, 146.

*Exceptions overruled.*¹

SALTER v. JONAS.

COURT OF ERRORS AND APPEALS OF NEW JERSEY. 1877.

[Reported 39 N. J. L. 469.]

IN error to the Supreme Court.

This was an action of ejectment for a small strip of land, being one-half of what had been a public street, in front of a lot of land which the plaintiff had conveyed to a certain person, and which lot had come, by divers mesne conveyances, to the defendants. The plaintiff's deed conveyed the premises by the following description, viz.:

"All that certain lot or parcel of land, situate, lying and being in the township of Bergen, in the county of Hudson and state of New Jersey, butted and bounded as follows: Beginning at a stake standing at the junction of the easterly line of Rowland street with the northerly line of Johnson street, as laid down on the map of said Salter's premises, and running thence (1) along the northerly line of Johnson street south, twenty-three degrees forty minutes east, fifty (50) feet, to a stake; thence (2) north, sixty-six degrees east, one hundred (100) feet, to a stake; thence (3) north, twenty-three degrees and forty minutes west, fifty (50) feet, to a stake in the said easterly line of Rowland street; thence (4) along the same south, sixty-six degrees west, one hundred (100) feet, to the beginning."

After Rowland street had been used for some time, it became useless, in consequence of another street having been opened, and the

¹ See *Marsh v. Burt*, 34 Vt. 289 (1861); *Cottle v. Young*, 59 Me. 105 (1871); *Peck v. Denniston*, 121 Mass. 17 (1876); *Dean v. Lowell*, 135 Mass. 55 (1883).

defendants had proceeded, thereupon, to take in and enclose to the middle line of the street in front of the lot above described.

At the trial in the Hudson Circuit, the court instructed the jury that the defendants' deed covered the land in the street which was in dispute, and there was a verdict accordingly.

For the plaintiff in error, *S. B. Ransom*.

For the defendant, *William Clark*.

The opinion of the court was delivered by

BEASLEY, C. J. This case, as it stands before this court, presents, in a distinct form, the question whether in a conveyance of lands which, in point of fact, abut upon a street or highway, anything short of express words of exclusion will prevent the title from extending to the *medium flum* of such street or highway, the grantor, at the date of such conveyance, being the owner of such street or highway to that extent.

This is a subject with respect to which the views of judges are much at variance. The general opinion appears to be that there is so strong a presumption of an intention to convey the soil of the highway when the premises granted actually border upon it, that very plain indications of a contrary purpose are requisite to exclude it. Under the operation of such a test, the present deed would not embrace the land in dispute, for the descriptive words cannot be extended from their intrinsic force, so as to have so wide a reach. The words here used will not, if interpreted in their familiar sense, and standing by themselves, admit of being taken as delineatory of any part of the street. The only point for consideration, therefore, is whether, when the terms used have this restrictive force, they are to lose that force in the presence of the great presumption to the contrary, which is inherent in the position of affairs where a lot thus located is granted.

There are, undoubtedly, decisions which tend very strongly to this point, and others which apparently reach it. The leading cases are carefully collected, and the general subject judiciously handled in the notes of Mr. Wallace, appended to the case of *Donaston v. Payne*, 2 Smith's Lead. Cas. (7th ed.) 160. In this series stands prominently the case of *Paul v. Carver*, decided by the Supreme Court of Pennsylvania, 26 Pa. St. 223. In that instance, the description carried the lot conveyed by so many feet to a designated street; "thence southeasterly along the northerly side of said street," and the street thus referred to was afterwards vacated, and it was held that half of it passed with the lot that was thus bounded by its northerly side. This result was justified on the broad ground "that the paramount intent of the parties, as disclosed from the whole scope of the conveyance, and the nature of the property granted, should be the controlling rule." A number of decisions, bearing a similar aspect, are cited in this opinion, which also displays, with much clearness, the impolicy of the opposite view. The commentator, with reference to this case, and other decisions, thus sums up the result: "The rule, therefore, which

the Pennsylvania courts regard as the true one, and which, perhaps, on the whole is the wisest one, would seem to be that nothing short of an intention expressed in *ipsis verbis*, to 'exclude' the soil of the highway, can exclude it."

And this doctrine, although it cannot be said to be sustained by the greatest number of decisions, is, I think, the one that ought to be adopted in this state. In our practice, in the conveyance of lots bounded by streets, the prevailing belief is, that the street to its centre is conveyed with the lot. Among the mass of the people it is undoubtedly supposed that the street belongs, as an appurtenance, to the contiguous property, and that the title to the latter carries with it a title to the former. This belief is so natural that it would not be easily eradicated. As a general practice, it would seem preposterous to sever the ownership to these several particles of property. Under ordinary circumstances, the thread of land constituting the street is of great value to the contiguous lots, and it is of no value separated from them. It would rarely occur that the vendee of a city lot would be willing to take it separated in ownership from the street, and it would as rarely occur that a vendor would desire to make such a severance. In my own experience, I have never known such an intention to exist, and it is safe to say that whenever it does exist, the conditions of the case are peculiar.

And it is the very general notion that these two parcels of property are inseparably united, and pass as a whole by force of an ordinary conveyance, that accounts for the absence of any settled formula in general use for the description of city lots in a transfer of their title. Upon an examination of such conveyances, it would, I am satisfied, be disclosed that the utmost laxity in this respect prevails. The property conveyed is indiscriminately described as going to the street and running along it, or as going to one side of such street and thence running along such side. Such discriminations are not intentional, the purpose being to convey all the interest that the seller has in the property and in its belongings, and the mode of accomplishing this purpose is not the subject of attention, the street lot, as I have said, being regarded as a mere adjunct of the property sold, and worthless for any other use. This being undeniably the practice and general understanding, to give a close and literal meaning to the descriptive terms employed in such instances would serve no useful purpose, but its tendency would be to defeat the object in view, and to call into life a vexatious litigation. The particular words should, in such transactions, be controlled and limited by the manifest intention which is unmistakably displayed in the nature of the affair and the situation of the parties. When the conditions of the case are altered, as if the vendor should, in a given case, have an apparent interest to reserve to himself the parcel of street in question, a different rule of interpretation might become proper. So if the abutting street referred to in a conveyance should be such only in contemplation, and should be con-

tingent on the will of the vendor, the rule now adopted might not, and probably would not, be applicable. But where the street is an existing highway, or has been dedicated as such by the vendor, or in case, by the effect of his conveyance, he imposes on himself the obligation to devote the street to the public use, the rule then becomes the criterion by which the sense of the deed is to be ascertained.

The only case in our books that I deem entirely apposite to the present inquiry, is that of *Hinchman et al. v. Paterson Horse Railroad Co.*, 2 C. E. Green, 75. The extreme fitness of this decision, as an authority at this time, does not appear upon reading the report of it; but I have looked at the original papers on file, and have found that in some of the deeds in that proceeding, the descriptions of the boundaries of the lots are not distinguishable from the one now under our view. Those lots were described as beginning at a fixed point on a designated side of the street, and thence along such designated side, &c., as in the present instance. The descriptive words, therefore, were clear, and if they were not overruled by the predominant presumption of intent arising out of the nature of the act done, it was impossible to hold that any part of the street passed to the vendee. But Chancellor Green did hold that the parcel in the street passed, saying: "It is objected, by the defendant's answer, that the complainant's titles do not extend to the middle of the street, because the lots, as described, are *bounded by the sides of the streets*. But the established inference of law is, that a conveyance of land, bounded on a public highway, carries with it the fee to the centre of the road, as part and parcel of the grant."

I do not know how this decision is to be sanctioned, except upon the ground already marked out. I regard the case as directly in point, and it is unnecessary to say that it is of the highest authority.

The result to which I have come is, therefore, that this conveyance embraces the parcel of land in the street, for the reason that there are no express words of exclusion of such parcel.

The consequence is, the judgment of the court below should be affirmed, with costs.¹

For affirmance — THE CHIEF JUSTICE, DALRIMPLE, DEPUE, DIXON, SCUDDER, VAN SYCKEL, WOODHULL, CLEMENT, GREEN, LILLY, WALES. 11.

For reversal — None.

¹ *Cox v. Freedley*, 83 Pa. 124 (1859), accord.

DODD v. WITT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1885.

[Reported 189 Mass. 63.]

WRIT of entry to recover a parcel of land in North Adams. Plea, *Nul disseisin*. Trial in the Superior Court, before *Gardner, J.*, who directed a verdict for the demandant, and reported the case for the determination of this court. The facts appear in the opinion.

S. P. Thayer, for the tenants.

M. E. Couch, (*C. J. Parkhurst* with him,) for the demandant.

FIELD, J. The demanded premises are a strip two rods wide on the westerly end of the lot described in the demandant's deed. The demandant derives title from Reuben Whitman, who in May, 1866, conveyed the premises to Thomas H. Lidford by a description as follows: "Commencing on the road at the southeast corner of the land that I gave D. H. Raymond a bond to convey; thence west twenty-two degrees thirty minutes north ten rods; thence south twenty-two degrees thirty minutes west four rods; thence east twenty-two degrees thirty minutes south ten rods; thence south on the road to the place of beginning." The descriptions in the mesne conveyances are substantially the same. The road was four rods wide, and Reuben Whitman when he executed his deed owned the fee of it. The deed therefore conveyed the land to the centre line of the highway. *Peck v. Denniston*, 121 Mass. 17; *O'Connell v. Bryant*, 121 Mass. 557.

The tenants contended, that by the construction of the deed, the side lines of the demanded premises extended ten rods from the centre line of the highway, or eight rods from the westerly side of the highway; or, if this were not the true construction, that there was an ambiguity in the description; and they offered "John Lidford, father of said Thomas H. Lidford, as a witness to prove that at the time of the execution of the above mentioned deed from Reuben Whitman to Thomas H. Lidford, the said witness was present;—and that said Whitman measured on the west line of the road above mentioned westerly eight rods, and fixed a monument at the northwest corner of the lot; thence southerly four rods to the southwest corner, and fixed a monument; thence southerly eight rods to the west side of the highway; thence on the highway to the place of beginning;—that his son Thomas H. Lidford and himself built a fence across the west end of said lot from corner to corner, as indicated by the monuments thus erected, at the time of said deed to Lidford, which fence remained until after the demandant went into possession under his deed;—that the land included within said measurement was all that Thomas H. Lidford purchased as he understood it at the time, except that he was told by Whitman that his grant really extended to the centre of the highway, which he was told was four rods wide." The court excluded this testi-

mony and ruled "that there was no ambiguity in the deeds offered by the plaintiff; that the monument called for 'on the road' was by the side of the road, and not the centre of the road;" and directed the jury to render a verdict for the demandant. This is a ruling that, by the construction of the deed, the lines extended ten rods from the westerly side of the road.

In *Peck v. Denniston*, *ubi supra*, Chief Justice Gray says: "The general rule is well settled that a boundary on a way, public or private, includes the soil to the centre of the way, if owned by the grantor, and that the way, thus referred to and understood, is a monument which controls courses and distances, unless the deed by explicit statement or necessary implication requires a different construction. *Newhall v. Ireson*, 8 Cush. 595; *Fisher v. Smith*, 9 Gray, 441; *Boston v. Richardson*, 18 Allen, 146; *White v. Godfrey*, 97 Mass. 472; *Motley v. Sargent*, 119 Mass. 231."

Not one of these cases, however, considers the construction to be given to a deed in which a highway is a point of departure for a measured line.

In *Newhall v. Ireson*, *ubi supra*, the line was "running northerly seven poles to the county road, and from thence upon the road twenty-two poles to the first-mentioned bound." The seven rods terminated on the north at an old wall, which formerly constituted the southerly boundary of the road. The court held that the line ran to the centre of the road, although this was more than seven rods.

The rule is stated in *Motley v. Sargent*, *ubi supra*, as follows: "It is a general rule of construction that where there is a boundary upon a fixed monument which has width, as a way, stream, or wall, even if the measurements run only to the side of it, the title to the land conveyed passes to the line which would be indicated by the middle of the monument."

The rule is then well established when the road is the *terminus ad quem*, but there is little authority when it is the *terminus a quo*, and there is no monument at the other end of the line.

A majority of the court is of opinion, that it is a common method of measurement in the country, where the boundary is a stream or way, to measure from the bank of the stream or the side of the way; and that there is a reasonable presumption that the measurements were made in this way, unless something appears affirmatively in the deed to show that they began at the centre line of the stream or way. The ruling of the court, in the construction of the deed, was therefore *prima facie* correct, as there was no monument to determine the other end of the line. But this presumption can be controlled by evidence that the parties at the time of the conveyance established monuments of the boundaries. Without determining whether, in this case, there can be said to be a latent ambiguity in the deed (see *Hoar v. Goulding*, 116 Mass. 182), or merely an indefiniteness in the description, we are of opinion that the acts of the parties contemporaneous with the delivery

of the deed in fixing the monuments, and the subsequent fencing of the lot and the occupation in accordance therewith, are admissible in evidence upon the construction to be given to the deed. *Blaney v. Rice*, 20 Pick. 62; *Stewart v. Patrick*, 68 N. Y. 450; *Hamm v. San Francisco*, 17 Fed. Rep. 119. *New trial*.¹

NOTE. — A, owner of a tract of land, laid it out in village lots. The streets therein were uniformly eighty feet in width, except one street on the margin of the tract which was only forty feet in width. A sold to B lots bounded on the marginal street. Neither A nor B owned the land upon the opposite side. Held, that B acquired the fee of the whole of that portion of the street upon which his lots bounded. *In re Robbins*, 34 Minn. 90 (1885). Cf. *Banks v. Ogden*, 2 Wall. 57 (U. S. 1864); *Brisbane v. St. Paul & S. C. R. Co.*, 23 Minn. 114 (1876); *Succession of Delachaise v. Maginnis*, 44 La. Ann. 1043 (1892).

¹ *Fraser v. Ott*, 95 Cal. 661 (1892), accord.

CHAPTER V.

ESTATES CREATED.

SECTION I.

ESTATES IN FEE SIMPLE.

LIT. § 1. Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs forever. And it is called in Latin, *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawful or pure. And so *feodum simplex* signifies a lawful or pure inheritance. *Quia feodum idem est quo hæreditas, et simplex idem est quod legitimum vel purum. Et sic feodum simplex idem est quod hæreditas legitima, vel hæreditas pura.* For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heirs: for these words (his heirs) make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him forever; or by these words, To have and to hold to him and his assigns forever: in these two cases he hath but an estate for term of life, for that there lack these words (his heirs), which words only make an estate of inheritance in all feoffments and grants.

Co. LIT. 8 b. And it is to be observed, that every word of Littleton is worthy of observation. First (heirs) in the plural number; for if a man give land to a man and to his heir in the singular number, he hath but an estate for life, for his heir cannot take a fee simple by descent, because he is but one, and therefore in that case his heir shall take nothing.¹ Also observable is this conjunctive (*et*). For if a man give lands to one, To have and to hold to him *or* his heirs, he hath but an estate for life, for the uncertainty.² . . . Here Littleton treateth of purchases by natural persons, and not of bodies politic or corporate; for if lands be given to a sole body politic or corporate (as to a bishop, parson, vicar, master of an hospital, &c.), there to give him an estate of inheritance in his politic or corporate capacity, he must have these words, To have and to hold to him and his successors; for without these words *successors*, in those cases there passeth no inheritance; for as the heir

¹ See Harg., note *ad loc.*; Elphinstone, Deeds, Rule 67, Obs.

² "As to the construction contended for, although it is supported by a *dictum* of Lord Coke's, it is a strictness not to be tolerated at the present day." *Per* SEWALL, J., in *White v. Crawford*, 10 Mass. 183, 188 (1813).

doth inherit to the ancestor, so the successor doth succeed to the predecessor, and the executor to the testator. But it appeareth here by Littleton, that if a man at this day give lands to I. S. and his successors, this createth no fee simple in him; for Littleton speaking of natural persons saith that these words (his heirs) make an estate of inheritance in all feoffments and grants, whereby he excludeth these words (his successors).

Co. Litt. 9 b, 10 a. And here it is to be observed (that I may speak once for all) that every period of our author in all his three books contains matter of excellent learning, necessarily to be collected by implication, or consequence. For example he saith here, that these words (*his heirs*) make an estate of inheritance in all feoffments and grants. He expressing feoffments and grants, necessarily implieth, that this rule extendeth not, —

First, to *last wills* and *testaments*; for thereby, as he himself after saith, an estate of inheritance may pass without these words (his heirs). As if a man devise twenty acres to another, and that he shall pay to his executors for the same ten pound, hereby the devisee hath a fee simple by the intent of the deviser, albeit it be not to the value of the land. So it is if a man devise lands to a man *in perpetuum*, or to give and to sell, or *in feodo simplici*, or to him and to his assigns forever. In these cases a fee simple doth pass by the intent of the deviser. But if the devise be to a man and his assigns without saying (forever), the devisee hath but an estate for life. If a man devise land to a man *et sanguino suo*, that is a fee simple; but if it be *semini suo*, it is an estate tail.

Secondly, that it extendeth not to a *fine sur conusans de droit come ceo que il ad de son done*, by which a fee also may pass without this word (heirs) in respect of the height of that fine, and that thereby is implied that there was a precedent gift in fee.

Thirdly, nor to *certain releases*, and that three manner of ways. First, when an estate of inheritance passeth and continueth; as if there be three coparceners or joint tenants, and one of them release to the other two, or to one of them generally without this word (heirs), by Littleton's own opinion they have a fee simple, as appeareth hereafter. 2. By release, when an estate of inheritance passeth and continueth not, but is extinguished; as where the lord releaseth to the tenant, or the grantee of a rent, &c., release to the tenant of the land generally all his right, &c., hereby the seignior, rent, &c., are extinguished forever, without these words (heirs). 3. When a bare right is released, as when the disseisee release to the disseisor all his right, he need not (saith our author in another place) speak of his heirs. But of all these, and the like cases, more shall be treated in their proper places. 4. Nor to a *recovery*. A., seised of land, suffereth B. to recover the land against him by a common recovery, where the judgment is *quod prædictus B. recuperet versus præd. A. tenementa prædicta cum pertin.*; yet B. recovereth a fee simple without this word (heirs); for

regularly every recoverer recovereth a fee simple. 5. Nor to a *creation of nobility by writ*; for when a man is called to the Upper House of Parliament by writ, he is a baron, and hath inheritance therein without the word (heirs). . . .

But out of this rule of our author the law doth make divers exceptions (*et exceptio probat regulam*); for sometime by a feoffment a fee simple shall pass without these words (his heirs). For example, first, if the father enfeoff the son, to have and to hold to him and to his heirs, and the son enfeoffeth the father as fully as the father enfeoffed him, by this the father hath a fee simple, *quia verba relata hoc maxime operantur per referentiam ut in esse videntur*. Secondly, in respect of the consideration, a fee simple had passed at the common law, without this word (heirs), and at this day an estate of inheritance [in] tail. As if a man had given land to a man with his daughter in frank-marriage generally, a fee simple had passed without this word (heirs); for there is no consideration so much respected in law as the consideration of marriage, in respect of alliance and posterity. Thirdly, if a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many persons capable, they have a fee simple without the word (successors); because in judgment of the law they never die. Fourthly, in case of a sole corporation a fee simple shall sometime pass without this word (successors). As if a feoffment in fee be made of land to a bishop, to have and to hold to him *in libera elemosina*, a fee simple doth pass without this word (successors). And so if a man give lands to the king by deed enrolled, a fee simple doth pass without these words (successors or heirs); because in judgment of law the king never dieth. Fifthly, in grants sometimes an inheritance shall pass without this word (heirs). As if partition be made between coparceners of lands in fee simple, and for owelty of partition the one grant a rent to the other generally, the grantee shall have a fee simple without this word (heirs); because the grantor hath a fee simple, in consideration whereof he granted the rent: *Ipsæ etenim leges cupiunt ut jure regantur*. Sixthly, by the forest law if an assart be granted by the king at a justice seat (which may be done without charter) to another, *habendum et tenendum sibi in perpetuum*, he hath a fee simple without this word (heirs); for there is a special law of the forest, as there is a law martial for wars, and a marine law for the seas.

And this rule of our author extendeth to the passing of estates of inheritances in exchanges, releases, or confirmations that inure by way of enlargement of estates, warranties, bargain and sales by deed indented and enrolled, and the like, in which this word (heirs) is also necessary; for they do tantamount to a feoffment or grant, or stand upon the same reason that a feoffment or grant doth; for like reason doth make like law, *ubi eadem ratio, ibi idem jus*. And this is to be observed throughout all these three books, that where other cases fall within the same reason, our author doth put his case but for example;

for so our author himself in another place explaineth it, saying, "and memorandum, that in all other [such] like cases, although it be not here expressly moved or specified, if they be in like reason, they are in the like law." And here our author is to be understood to speak of heirs when they are inheritable by descent, for they are capable of land also by purchase, and then the course of descent is sometimes altered. As if lands of the nature of gavelkind be given to B. and his heirs, having issue divers sons, all his sons after his decease shall inherit; but if a lease for life be made, the remainder to the right heirs of B., and B. dieth, his eldest son only shall inherit, for he only to take by purchase is right heir by the common law. So note a diversity between a purchase and a descent. But where the remainder is limited to the right heirs of B., it need not be said, and to their heirs; for being plurally limited it includeth a fee simple, and yet it resteth but in one by purchase.¹

SECTION II.

ESTATES TAIL.

Co. Lit. 20 a, b. In gifts in tail these words (*heirs*) are as necessary, as in feoffments and grants; for seeing every estate tail was a fee simple at the common law, and at the common law no fee simple could be in feoffments and grants without these words (*heirs*), and that an estate in fee tail is but a cut or restrained fee, it followeth, that in gifts in a man's life-time no estate can be created without these words (*heirs*), unless it be in case of frankmarriage, as hereafter shall be showed. And where Littleton saith (*heirs*), yet (*heir*) in the singular number in

¹ See *Anderson v. Logan*, 105 N. C. 296 (1890). Cf. *Cole v. Lake Company*, 54 N. H. 242, 279-290 (1874).

As to determinable fees, see *First Universalist Society v. Boland*, 155 Mass. 171 (1892); Gray, *Perp.* (2nd ed.) §§ 81-42.

In *Lewis v. Rees*, 8 K. & J. 132 (1856) land was conveyed by deed to A for life, then to B for life, then to C and D, and their heirs, in trust to preserve contingent interests, then over. It was argued that the trust was intended to continue only during the lives of A and B, that upon the deaths of A and B the trustees ceased to have any legal estate and that the persons entitled under the limitations over took legal estates. The court held, that the trustees took a fee, that their estate could not be restricted to such estate as was necessary for the purposes of the trust, and that therefore the persons entitled under the limitations over took only equitable estates. *Cooper v. Kynock*, L. R. 7 Ch. App. 396 (1872) accord.

But in *Newhall v. Wheeler*, 7 Mass. 189 (1810), where land had been conveyed to A, B, and C, selectmen of a town, and their "successors," in trust for D and his heirs, the court held, that the trustees took a fee. "The legal estate of the trustees shall be commensurate with the equitable estate of the *cestui que trust*, which in this case is a fee simple." The court gave no authorities or reasoning in support of this conclusion. The doctrine of *Newhall v. Wheeler* has, however, been generally followed in the United States. See *Angell v. Rosenbury*, 12 Mich. 241, 266 (1864).

a special case may create an estate tail, as appeareth by 39 Ass. p. 20, hereafter mentioned. And yet if a man give lands to A. *et hæredibus de corpore suo*, the remainder to B. *in forma prædicta*, this is a good estate tail to B. for that in *forma prædicta* do include the other. If a man letteth lands to A. for life, the remainder to B. in tail, the remainder to C. *in forma prædicta*, this remainder is void for the uncertainty. But if the remainder had been, the remainder to C. *in eadem forma*, this had been a good estate tail; for *idem semper proximo antecedenti refertur*. If a man give lands or tenements to a man, *et semini suo* or *exitibus vel prolibus de corpore suo*, to a man, and to his seed, or to the issues or children of his body, he hath but an estate for life; for albeit that the Statute provideth, that *voluntas donatoris secundum formam in charta doni sui manifeste expressam de cætero observetur*, yet that will and intent must agree with the rules of law. And of this opinion was our author himself, as it appeared in his learned reading afore-mentioned upon this Statute, where he holdeth, if a man giveth land to a man *et exitibus de corpore suo legitime procreatis*, or *semini suo*, he hath but an estate for life, for that there wanteth words of inheritance.

These words [*of his body*] are not so strictly required but that they may be expressed by words that amount to as much: for the example that the Statute of W. 2 putteth hath not these words (*de corpore*) but these words (*hæredibus*) viz. *Cum aliquis dat terram suam alicui viro et ejus uxori et hæredibus de ipsis viro et muliere procreatis*. If lands be given to B. *et hæredibus quos idem B. de prima uxore sua legitime procrearet*, this is a good estate in especial tail (albeit he hath no wife at that time) without these words (*de corpore*). So it is if lands be given to a man, and to his heirs which he shall beget of his wife, or to a man *et hæredibus de carne sua*, or to a man *et hæredibus de se*. In all these cases these be good estates in tail, and yet these words *de corpore* are omitted.¹

Co. LIT. 26 b. John de Mandeville by his wife Roberge had issue Robert and Mawde. Michael de Morevill gave certain lands to Roberge and to the heirs of John Mandeville her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee tail vested in Robert (heirs of the body of his father being a good name of purchase), and that when he died without issue, Mawde the daughter was tenant in tail as heir of the body of her father, *per formam doni*, and the formedon which she brought supposed, "*quod post mortem præfatæ Robergiæ et Roberti filii et hæredis ipsius Johannis Mandeville et hæred' ipsius Johannis de præfata Robergia per præfatum Johannem procreat' præfat' Matildæ filiæ prædict' Johannis de præfata Robergia per præfatum Johannem procreatæ sorori et hæredi prædicti Roberti descendere debet per formam donationis prædict'.*" And yet in truth the land did not descend unto her from Robert, but because she could have no other writ it was adjudged to be good. In

¹ See Stimson, Am. St. Law, § 1818.

which case it is to be observed, that albeit Robert being heir took an estate tail by purchase, and the daughter was no heir of his body at the time of the gift, yet she recovered the land, *per formam doni*, by the name of heir of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she took nothing but in expectancy, when she became heir *per formam doni*.

SECTION III.

ESTATES FOR LIFE.

Co. Lit. 42 a, b. If a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quam diu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay x l. &c., or until the grantee be promoted to a benefice, or for any like uncertain time, which time, as Bracton saith, is *tempus indeterminatum*: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the deed, and in count or pleading he shall allege the lease, and conclude, that by force thereof he was seised generally for term of his life.

If a man make lease of a manor, that at the time of the lease made is worth xx l. *per annum*, to another until c l. be paid, in this case because the annual profits of the manor are uncertain, he hath an estate for life, if livery be made determinable upon the levying of the c l. But if a man grant a rent of xx l. *per annum* until c l. be paid, there he hath an estate for five years, for there it is certain, and depends upon no uncertainty. And yet in some cases a man shall have an uncertain interest in lands or tenements, and yet neither an estate for life, for years, or at will. As if a man by his will in writing, devise his lands to his executors for payment of debts, and until his debts be paid; in this case the executors have but a chattel, and an uncertain interest in the land until his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a chattel, it shall go to the executors of executors for the payment of his debts: and so note a diversity between a devise and a conveyance at the common law in his lifetime. And tenant by statute merchant, by statute staple, and by *elegit*, have uncertain interests in lands or tenements, and yet they have but chattels, and no freehold, whose estates are created by divers Acts of Parliament, whereof more shall be said hereafter. And so have guardians in chivalry which hold over for single or double value uncertain interests, and yet but chattels.

If one grant lands or tenements, reversions, remainders, rents, advowsons, commons, or the like, and express or limit no estate, the lessee or grantee (due ceremonies requisite by law being performed) hath an estate for life. The same law is of a declaration of a use. A man may have an estate for term of life determinable at will; as if the king doth grant an office to one at will, and grant a rent to him for the exercise of his office for term of his life, this is determinable upon the determination of the office.

A. tenant in fee simple, makes a lease of lands to B. to have and to hold to B. for term of life, without mentioning for whose life it shall be, it shall be deemed for term of the life of the lessee, for it shall be taken most strongly against the lessor, and as hath been said an estate for a man's own life is higher than for the life of another. But if tenant in tail make such a lease without expressing for whose life, this shall be taken but for the life of the lessor, for two reasons.

First, when the construction of any act is left to the law, the law, which abhorreth injury and wrong, will never so construe it as it shall work a wrong: and in this case, if by construction it should be for the life of the lessee, then should the estate tail be discontinued, and a new reversion gained by wrong: but if it be construed for the life of the tenant in tail, then no wrong is wrought. And it is a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken.

Secondly, the law more respecteth a lesser estate by right, than a larger estate by wrong; as if tenant for life in remainder disseise tenant for life, now he hath a fee simple, but if tenant for life die, now is his wrongful estate in fee by judgment in law changed to a rightful estate for life.

ROSSE'S CASE.

QUEEN'S BENCH. 1598.

[Reported 5 Co. 13 a.]

BETWEEN Peter Rosse and Aldwick in an *Ejectione firmæ*, which began Pasch. 37 Eliz. Rot. 499, the case was such; a lease is made to A. and his assigns, *habendum* to him during his life, and the lives of B. and C.; and if this limitation during the life of B. and C. were void or not, was the question. And it was adjudged, that the limitation was good; for where it was objected that when a man hath two estates in him, the greater shall drown the less, and that an estate for his own life is higher than for the life of another; and therefore an estate for his own life, and for the lives of others, cannot stand together, — to

that it was answered and resolved, that in the case at bar, the lessee had but one estate, which hath this limitation, *scil.* during his life, and the lives of two others, and he hath but one freehold, and therefore there cannot be any drowning of estates in the case, but he hath an estate of freehold to continue during these three lives, and the survivor of them.¹

BEESON v. BURTON.

COMMON PLEAS. 1852.

[Reported 12 C. B. 647.]

THE names of John Burton and twenty-eight other persons claiming under similar circumstances, appeared on the list of persons claiming to be entitled to vote in the election of any knight of the shire for the southern division of the county of Leicester, and were all duly objected to by the appellant.

The said John Burton appeared on the list of claimants, as follows:—

Name of voter.	Place of abode.	Nature of qualification.	Street, &c., where the property is situate, &c.
Burton, John.	8, Haymarket.	Freehold interest in building and land.	On road, T. Freeman's Common.

John Burton is a resident freeman of the borough of Leicester, and possessed of an allotment of land under the provisions of a private Act of Parliament, 8 and 9 Vict. c. 6, intituled "An Act to repeal so much of an Act for enclosing lands in or near the borough of Leicester, as relates to the regulation and management of the freemen's allotments, and to make other provisions in lieu thereof." By this Act, which was annexed to and formed part of the case, the resident freemen are empowered to elect from their own body a certain number of deputies to act for them in the regulation and general management of the freemen's allotments.

The 8th section empowers the deputies to take possession of the lands comprised in the first schedule of the Act (of which lands the allotment of the present claimant forms a part), and break up the whole or such parts thereof as to them shall seem expedient, and apportion and divide the same when so broken up into small allotments, not exceeding five hundred yards each, among the resident freemen desiring to become occupiers thereof, at an annual rent to be fixed at the discretion of the

¹ See St. 29 Car. II. c. 3, § 12 (1677); Stimson, Am. St. Law, § 1335.

deputies, but not exceeding one farthing for every square yard, nor less than one shilling for every hundred yards; the allotments to be held respectively by each resident freeman desiring to become the occupier, and obtaining possession thereof, so long as he shall be willing to hold the same, and shall pay the annual rent, and conform to the orders and regulations to be made from time to time by the said deputies.

By the 15th section, all the lands comprised in the two schedules of the Act, are vested absolutely in the deputies for the time being, in trust for the resident freemen.

By the 17th section, the deputies have power to dispose, by absolute sale, of all or any part of the allotment comprised in the first schedule of the Act, freed and discharged from all right, claim, and interest of the resident freemen, but, by the 22d section, no sale is to be effected under the powers of the Act, without the consent of the major part of the freemen assembled at a public meeting, to be convened and conducted in the manner directed by this section.

By the 82d section in case any freeman shall be in arrear of rent for his allotment, for the space of fourteen days, or shall not conform to the provisions of the Act, or the orders, rules, and regulations to be made by the deputies, the said deputies may re-enter such allotment, and by force evict and dispossess such freeman.

The claimant has erected buildings on the land allotted to him, which land and buildings are above the value of 40s. above all charges.

It was contended, on the part of the appellant, that the claimant had no freehold interest in his allotment; but the revising-barrister decided that he had, and inserted his name accordingly on the list of voters for the parish of St. Mary, Leicester.

The cases of Thomas Archer, and twenty-seven other persons whose claims depended on the same point, were consolidated with the principal case.

W. E. Cox, for the appellant.

G. Hayes, for the respondent.

JERVIS, C. J. It seems to me that the view taken by the revising-barrister in this case was correct, and that his decision must be affirmed, — the claimant having a freehold interest which entitled him to vote. It was admitted by the appellant's counsel, that the possession of a freehold interest of an uncertain duration, would entitle the party to a vote: but it was insisted that the estate which each allottee under this Act has, is not an estate of an uncertain duration, within the rule laid down in *Co. Lit.* 42 a, because it was determinable by the deputies; and therefore that the case must be governed by that of *Davis*, app., *Waddington*, resp., 7 M. & G. 37; 8 Scott N. R. 807. But, upon looking at the 8th section of the 8 & 9 Vict. c. 6, I find that each allottee is to hold his allotment "so long as he shall be willing to hold the same, and shall pay the annual rent, and conform to the orders and regulations to be made from time to time by the said deputies." This provision is sufficient *per se* to create a freehold inter-

est. But it is said that the whole scope of the Act, and especially the power vested in the deputies, by § 17, to sell the land, with the consent of the major part of the freemen, shows that it was not intended to give the allottees a freehold. If this is not a freehold, what estate is it? It clearly is not an estate for years: nor is it an estate at the absolute and uncontrolled will of the lessors. It is suggested that it is a sort of parliamentary estate, floating between an estate of freehold and an estate at will. It would manifestly be very inconvenient so to hold; and I do not see how we can consistently with the rules of law hold this to be any other than an estate of freehold. It is plain, according to the case of *Davis*, app., *Waddington*, resp., that, if the deputies had the power at any moment to turn out the allottees, their estate would have been a mere estate at will, and would not have conferred a vote. But this is not an estate held at the uncontrolled will of the grantors, but at the will of strangers, or subject to the consent of the deputies and the majority of the freemen, of whom the allottee is one. The estate, therefore, is held upon an uncertain event, for, it is uncertain whether the majority will consent to a sale or exchange; and therefore the case falls within the definition of an estate for life in Co. Lit. 42 a. Consequently the claimant had a freehold interest, in respect of which he was entitled to be registered.

MAULE, J. I also am of opinion that the claimant in this case was rightly held by the revising-barrister to be entitled to a freehold interest in his allotment. It is well established that an estate which may last for a man's life is, ordinarily, a freehold. An estate for life, determinable on an event which is not in the power of the lord from whom it is held, is a freehold. An estate determinable on a condition, which condition cannot arise at the absolute will of the lord, is a freehold. Here, the duration of the estate depends upon the will of the tenant, which will not prevent its being an estate of freehold: but the estate is capable of being determined upon an event of a very special kind happening, — on the resolution of the deputies to sell or exchange the land, and the concurrence of the majority of the freemen. That is an event which is not dependent on the will of the lord. There is not that arbitrary power of removal which will prevent the estate from being a freehold. It is as much out of the power of the lord to determine the estate, as if his concurrence were not necessary at all. His concurrence being necessary, does not make the concurrence of the others less independent of him. An estate which may last for the life of the grantor, though determinable under circumstances like those of this case, is clearly such an estate as according to the older authorities is an estate of freehold. The case of *Davis*, app., *Waddington*, resp., appears to have been well decided. The party claiming to vote there, was appointed by the trustees to be an inmate of the almshouses, so long as they should think fit to allow him to continue there. It was held, quite conformably with the general law, that that did not constitute a freehold interest: and it is equally clear that the interest the party in this case has is a freehold.

WILLIAMS, J. I am of the same opinion. This is clearly an estate of freehold, inasmuch as it is for an uncertain interest, which may last for the life of the party, and is not confined to the will of the grantors. It comes, therefore, within the examples given in some of the older cases.

TALFOURD, J., concurred.

*Decision affirmed, with costs.*¹

SECTION IV.

ESTATES FOR YEARS, FROM YEAR TO YEAR, AND AT WILL.

LIT. § 70. Also, if a man make a deed of feoffment to another of certain lands, and delivereth to him the deed, but not livery of seisin; in this case he, to whom the deed is made, may enter into the land, and hold and occupy it at the will of him which made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him.

LIT. § 740. But where such lease or grant is made to a man and to his heirs for term of years, in this case the heir of the lessee or the grantee shall not after the death of the lessee or the grantee have that which is so let or granted, because it is a chattel real, and chattels reals by the common law shall come to the executors of the grantee, or of the lessee, and not to the heir.²

Co. LIT. 45b. Words to make a lease be, demise, grant, to farm let, betake; and whatsoever word amounteth to a grant may serve to make a lease. In the king's case this word *Committo* doth amount sometime to a grant, as when he saith *Commisimus W. de B. officium seneschalsie, &c., quamdiu nobis placuerit*, and by that word also he may make a lease: and therefore *a fortiori* a common person by that word may do the same.

"Of certain years." For regularly in every lease for years, the term must have a certain beginning and a certain end; and herewith agreeth Bracton, *terminus annorum certus debet esse et determinatus*. And Littleton is here to be understood, first, that the years must be certain when the lease is to take effect in interest or possession. For before it takes effect in possession or interest, it may depend upon an uncertainty, viz. upon a possible contingent before it begin in possession or interest, or upon a limitation or condition subsequent.

¹ See Serjeant Manning's note to *Davis v. Waddington*, 7 M. & G. 87, 45-49 (1844); *Fernie v. Scott*, L. R. 7 C. P. 202 (1871); *Western Transp. Co. of Buffalo v. Lansing*, 49 N. Y. 499 (1872); *Warner v. Tanner*, 38 Ohio St. 118 (1882); *Gilmore v. Hamilton*, 83 Ind. 196 (1882).

² On the limitation of a term to one and the heirs of his body, see Fearn, C. R. 460-463.

Secondly, albeit there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain it sufficeth, *Quia id certum est quod certum reddi potest*. For example of the first. If A., seised of lands in fee, grant to B. that when B. pays to A. xx. shillings, that from thenceforth he shall have and occupy the land for 21 years, and after B. pays the xx. shillings, this is a good lease for 21 years from thenceforth. For the second, if A. leaseth his land to B. for so many years as B. hath in the manor of Dale, and B. hath then a term in the manor of Dale for 10 years, this is a good lease by A. to B. of the land of A. for 10 years. If the parson of D. make a lease of his glebe for so many years as he shall be parson there, this cannot be made certain by any means, for nothing is more uncertain than the time of death, *Terminus vitæ est incertus, et licet nihil certius sit morte, nihil tamen incertius est hora mortis*. But if he make a lease for three years, and so from three years to three years, so long as he shall be parson, this is a good lease for six years, if he continue parson so long, first for three years, and after that for three years; and for the residue uncertain.

If a man maketh a lease to I. S. for so many years as I. N. shall name, this at the beginning is uncertain; but when I. N. hath named the years, then it is a good lease for so many years.

A man maketh a lease for 21 years if I. S. live so long; this is a good lease for years, and yet is certain in uncertainty, for the life of I. S. is uncertain. See many excellent cases concerning this matter put in the said *Case of the Bishop of Bath and Wells*. By the ancient law of England, for many respects a man could not have made a lease above 40 years at the most, for then it was said that by long leases many were prejudiced, and many times men disinherited, but that ancient law is antiquated.¹

Co. Lrr. 55a. It is regularly true, that every lease at will must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implieth it to be at the will of the lessee also; for it cannot be only at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the books that seem *prima facie* to differ, clearly reconciled. . . .

There is an express *ouster*, and implied *ouster*; an express, as when the lessor cometh upon the land, and expressly forewarneth the lessee to occupy the ground no longer; an implied, as if the lessor without the consent of the lessee enter into the land and cut down a tree, this is a determination of the will; for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawful, albeit the will doth continue. If a man leaseth a manor at will whereunto a common is appendant, if the lessor put in his beasts to use the common, this is a

¹ See Stimson, Am. St. Law, § 1841.

determination of the will. The lessor may by actual entry into the ground determine his will in the absence of the lessee, but by words spoken from the ground the will is not determined until the lessee hath notice. No more than the discharge of a factor, attorney, or such like, in their absence, is sufficient in law until they have notice thereof.¹

¹ 2 BL. Com. 100, 161. "A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly related to the *vicum radium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the Statute 18 Edw. I. *De Mercatoribus*, and thence called a statute merchant; the other pursuant to the Statute 27 Edw. III. c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by Act of Parliament in certain trading towns, from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the Statute 28 Hen. VIII. c. 6, amended by 8 Geo. I. c. 25, which directs such recognizances to be enrolled and certified into chancery. But these by the Statute of Frauds, 29 Car. II. c. 3, are only binding upon the lands in the hands of *bona fide* purchasers, from the day of their enrolment, which is ordered to be marked on the record.

"Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called, an estate by *elegit*. What an *elegit* is, and why so called, will be explained in the Third Part of these Commentaries. At present I need only mention that it is the name of a writ, founded on the Statute of Westm. 2 (13 Edw. I. c. 18), by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid; and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe, that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the Statute of *Quia Emptores* (18 Edw. I.), it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the Statute, therefore, of Westm. 2, permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the Statute *De Mercatoribus* (13 Edw. I.), passed the same year, the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though one half of them was liable to be taken in execution for any other debt of the owner.

"I shall conclude what I had to remark of these estates by statute merchant, statute staple, and *elegit*, with the observation of Sir Edward Coke (1 Inst. 42, 43): 'These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds;' (which makes them an exception to the general rule) 'because though they may hold an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid; yet it shall go to their executors: for *ut* is similitudinary; and though to recover their estates, they shall have the same remedy (by *assize*) as a ten-

RIGHT d. FLOWER v. DARBY.

KING'S BENCH. 1786.

[Reported 1 T. R. 159.]

EJECTMENT tried at the last assizes at Salisbury, before *Hotham*, Baron, when a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench on the following case:—

That the lessor of the plaintiff was seised in fee of the premises in question. That on the 11th day of May, 1781, the defendant, Darby, took the premises, which are a house in Salisbury, and occupied them as a public-house from that time under a parol demise at £10 *per annum*; the rent to commence from Midsummer then next following. The defendant, Darby, let part of the premises to the defendant Bristow. That on the 26th March, 1785, the defendant Darby was served with a notice to quit on the 29th of September following.

The question is, Whether the lessor of the plaintiff is entitled to recover?

Le Mesurier, for the plaintiff.

Gibbs, for the defendant.

LORD MANSFIELD, C. J.

When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term.

If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But then it is necessary for the sake of convenience, that, if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year; now this is a notice

ant of the freehold shall have, yet it is but the similitude of a freehold, and *nullum simile est idem*.' This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold; but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir; which is probably owing to this: that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has therefore thus directed their succession; as judging it reasonable from a principle of natural equity, that the security and remedy should be vested in those to whom the debts if recovered would belong. For upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to his executors (Co. Lit. 42); because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid."

See *Jemmot v. Cooly*, 1 Lev. 170 (1665).

to quit in the middle of the year, and therefore not binding, as it is contrary to the agreement.

As to the case of lodgings, that depends on a particular contract, and is an exception to the general rule. The agreement between the parties may be for a month or less time, and there to be sure much shorter notice would be sufficient, where the tenant has held over the time agreed upon, than in the other case. The whole question depends upon the nature of the first contract.

ASHURST, J. There is no distinction in reason between houses and lands, as to the time of giving notice to quit. It is necessary that both should be governed by one rule. There may be cases, where the same hardship would be felt in determining that the rule did not extend to houses as well as lands; as in the case of a lodging-house in London, being let to a tenant at Lady-day to hold as in the present case: if the landlord should give notice to quit at Michaelmas, he would by that means deprive the lessee of the most beneficial part of the term, since it is notorious that the winter is by far the most profitable season of the year for those who let lodgings.

BULLER, J. It is taken for granted by the counsel for the plaintiff, that the rule of law, which construes what was formerly a tenancy at will of lands into a tenancy from year to year, does not apply to the case of houses; but there is no ground for that distinction. The reason of it is, that the agreement is a letting for a year at an annual rent; then if the parties consent to go on after that time, it is a letting from year to year. This reason extends equally to the present case; an annual rent is here reserved; and upon such a holding it has been determined that *half a year's notice* to quit is necessary. This doctrine was laid down as early as in the reign of Henry the Eighth (13 H. VIII. 15 b).¹ The moment the year began, the defendant had a right to hold to the end of that year; therefore there should have been half a year's notice to quit before the end of the term. This gives rise to another objection in this case, upon the distinction between six months and half a year. The case in the Year-Books requires half a year's notice; but here there is less than half a year's notice, and therefore it is bad on that ground also. *Judgment for the defendant.*²

¹ The following remark of Serjeant Willoughby is the passage referred to: "If the lessor does not give him notice before the half year, he can justify for the next year, and so from year to year."

² In *Mills v. Goff*, 14 M. & W. 72 (1845), a tenancy from year to year had commenced on the 11th of October. On the 17th of June, 1840, the tenant was given a notice to quit "on the 11th October now next ensuing, or such other day and time as his said tenancy might expire on." Held, this was not a good notice for the year ending on the 11th of October, 1841.

RICHARDSON v. LANGRIDGE.

COMMON PLEAS. 1811.

[Reported 4 Tamm. 128.]

TRESPASS for breaking and entering a stable of the plaintiff, and breaking to pieces the doors and locks, and tearing down, damaging, and destroying the bins, troughs, and mangers of the plaintiff, and locking up the stable, and expelling the defendant from his possession. The defendant pleaded, first, Not guilty; secondly, that R. Crossley, being seised in fee of the premises, by indenture demised to the defendant, among other things, the stable, for a term of twenty-one years yet unexpired, by virtue whereof the defendant entered and was possessed, and by reason of such possession justified the acts complained of in the declaration. The plaintiff, confessing the seisin of Crossley, and the lease to the defendant, replied, that the defendant afterwards, and during the said term of twenty-one years, demised to the plaintiff the said stable with the appurtenances, to hold to the plaintiff during a certain term, that is to say, for so long a time as they, the plaintiff and the defendant, should respectively please, the plaintiff rendering to the defendant a certain compensation between them in that behalf agreed upon for the same, by virtue of which demise the plaintiff entered and was possessed, until the defendant afterwards and *during the continuance of the said term, and interest of the plaintiff therein* of his own wrong committed the said several trespasses. The defendant apprehending that the demise laid in the plea was descriptive of a holding from year to year, instead of rejoining that he had determined his will, rejoined, that he *did not demise* the said stable to the plaintiff in manner and form as the plaintiff had alleged, and tendered issue thereon, in which the plaintiff joined. Upon the trial of this cause, at the Maidstone Summer Assizes, 1811, before *Lord Ellenborough*, C. J., the evidence was, that the defendant having taken a lease of a close of land, and built a shed therein, in August, 1810, let the same by parol to the plaintiff, who was a carrier, upon an agreement made without any reference to time, that the plaintiff should convert it into a stable, and that the defendant should have all the dung made by the plaintiff's horses. The plaintiff, after having for some time occupied it in its original state, laid out about six pounds in putting up a rack and manger, and converting the building to a stable; about the end of the following April the defendant requested him to leave the premises, and upon his refusing to do it till he could suit himself elsewhere, the defendant, in the plaintiff's absence, and without having given him any written notice to quit, forced open the door, took down the rack and manger, and carried it out of the stable, and took and used the manure which had been made upon the premises during the plaintiff's occupation of them, and which was of considerable value. The defendant's counsel contended, that

the evidence proved a strict tenancy at will (which, though it made good the defendant's case, the plaintiff by his replication himself alleged, and the defendant by his rejoinder denied), and that therefore the defendant was entitled at any time to determine his will, and to enter upon the premises and resume the possession when he pleased, without any notice to quit. The counsel for the plaintiff contended that this must be a yearly holding, or that at all events the defendant having put the plaintiff into possession, and suffered him to contract an expense, by erecting a rack and manger, could not countermand the permission at his pleasure, upon the same principle on which, in the case of *Winter v. Brockwell*, 8 East, 308 it was held, that a license once executed, if it be to a thing whereby the party incurs expense, cannot be revoked, unless the grantor tenders to the grantee all the expense which he has incurred in executing the license. Lord Ellenborough, C. J., thought that the demise being so long as each party should respectively please, warranted the defendant in putting an end to the holding when he pleased, and in evicting the tenant without any notice; whereupon the plaintiff, either not advertg to the terms of his issue, or probably fearing that though he had literally proved his issue, and was entitled to a verdict thereon, the defendant would be entitled to judgment *non obstante veredicto*, submitted to a nonsuit.

Best, Serjt., on this day moved for a rule *nisi* to set aside the nonsuit and have a new trial.

MANSFIELD, C. J. *Winter v. Brockwell* has not the slightest resemblance to the present case. You must find some Act of Parliament, or some decision of the courts, that two persons cannot agree to make a tenancy at will. But it is a maxim, that *modus et conventio vincunt legem*. Have you any case where the courts have declared that there must be a tenancy from year to year, the parties having expressly agreed that the holding shall be so long as both parties please? and of that there is evidence here: you say that Lord Ellenborough was of opinion that the evidence did not prove a tenancy for a year: the nonsuit then must have proceeded on the ground that there was such an agreement as the plaintiff has himself stated. Here you speak, all along, of an indefinite agreement. If there were a general letting at a yearly rent, though payable half-yearly, or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year. But if two parties agree that the one shall let, and the other shall hold, so long as both parties please, that is a holding at will, and there is nothing to hinder parties from making such an agreement.

HEATH, J. I am of the same opinion. It is said that an indefinite hiring of a servant is an hiring for a year, but those cases do not apply. That presumption is founded upon the universal custom of hiring servants at statute fairs, which is usually for a year. There is no custom that if a man lets premises to another he shall let them for a year.

CHAMBRE, J., denied the proposition, that at this day there is no such thing as a tenancy at will: the taking of the dung by the landlord gave the tenant no term in the premises. Surely the distinction has been a thousand times taken: a mere general letting is a letting at will: if the lessor accepts yearly rent, or rent measured by any aliquot part of a year, the courts have said, that is evidence of a taking for a year. That is the old law, and I know not how it has ever come to be changed. The courts have a great inclination to make every tenancy a holding from year to year, if they can find any foundation for it, but in this case there is none such. *The court refused the rule.*¹

DOE d. TILT v. STRATTON.

COMMON PLEAS. 1828.

[Reported 4 Bing. 446.]

THE lessor of the plaintiff had entered into an agreement to grant the defendant a lease of the premises described in the declaration, for seven years, to commence on the 29th of September, 1820. The lease was never executed, but the defendant occupied the premises, and paid the rent which was to have been reserved by the lease. On the 29th September, 1827, the defendant, having received no notice to quit, refused to deliver up the premises to the lessor of the plaintiff, whereupon the present action was commenced.

At the trial before *Best*, C. J., Middlesex Sittings after Michaelmas Term last, a verdict was taken for the lessor of the plaintiff, with liberty for the defendant to move to enter a nonsuit, if the court should be of opinion that he was entitled to notice to quit.

Jones, Serjt., accordingly now moved to enter a nonsuit.

BEST, C. J. We should multiply notices to quit unnecessarily if we held that this action did not lie. Within the seven years the defendant could not have been turned out without notice; but at the end of the seven years the contract itself gives him sufficient notice. The point is, in effect, decided in *Doe d. Bloomfield v. Smith*, 6 East, 520, and *Doe d. Oldershaw v. Breach*, 6 Esp. N. P. C. 106.

PARK, J., concurred.

BURBROUGH, J. During the seven years notice would have been necessary, but not at the end of that period.

GASELEE, J. Notice was not necessary in this case, nor does the agreement give one party any advantage over the other.

Rule refused.

¹ See accord, *Rich v. Bolton*, 46 Vt. 84 (1873).

DOE d. TOMES v. CHAMBERLAINE.

EXCHEQUER. 1839.

[Reported 5 M. & W. 14.]

EJECTMENT for a piece of land at Leamington. At the trial before *Lord Denman*, C. J., at the last Warwick Assizes, it appeared that the defendant had been let into possession of the land in question by the plaintiff, under an agreement of purchase, dated the 22d Feb., 1833, by which it was stipulated that the defendant should be let into possession forthwith, paying interest after the rate of £5 per cent per annum on the amount of the purchase-money until the completion of the purchase, which was to be completed by the 22d May then next. The defendant had remained in possession of and built upon the land, and no evidence was given to show that any conveyance had been tendered to him, or that the plaintiff had taken any steps to enforce the completion of the purchase; but the defendant failing to pay the interest punctually, the present ejectment was brought, no notice to quit having been first given. It was contended for the defendant, that by the operation of the agreement a tenancy from year to year was created between the parties. The learned judge was of opinion that the defendant had nothing more than an estate at will, and directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit.

Goulburn, Serjt., now moved accordingly [citing *Saunders v. Musgrove*, 6 B. & C. 524].

LORD ABINGER, C. B. I think there is no ground for a rule. If this were a case in a court of equity, it is clear the court would not allow the vendor to take back the estate, unless he were in a condition to fulfil the contract on his part. But in a court of law, we can only look at the legal title. This is not an estate for years, for life, in tail, or in fee: there is no annual reversion of rent, but only a reversion of interest until the principal money is paid, and the contract completed. In the case cited, there was a clear intention to create a tenancy at a fixed annual rent; here there is nothing of the kind.

PARKE, B. At law, this is nothing more than an estate at will; there is a provision also for payment of interest, but not by way of compensation for the occupation of the land: the agreement for payment of interest is quite independent of the occupation of the estate. In *Saunders v. Musgrove*, it was clear that a sum of £100 a year was to be paid as a compensation for the occupation of the premises, by equal half-yearly payments: that was clearly in the nature of a rent until the 25th of December then following, and if the contract were not then completed, to go on upon the same terms. That is not so here; and if the party be let into possession, he has nothing but the lowest estate

known to the law, viz., an estate at will, which may be determined by demand or by entry.

ALDERSON, B. I am of the same opinion. *Saunders v. Musgrove* was in effect the case of a letting at a yearly rent.

GURNEY, B., concurred.

Rule refused.

DOE d. THOMSON v. AMEY.

QUEEN'S BENCH. 1840.

[*Reported 12 A. & E. 476.*]

EJECTMENT, on the several demises of Elizabeth Thomson and others, to recover possession of a farm occupied by the defendant.

On the trial, at the Cambridge Spring Assizes, 1839, before *Tindal*, C. J., it appeared that on 29th July, 1835, articles of agreement had been entered into between Miss Thomson, the lessor of the plaintiff, and the defendant, whereby Miss Thomson, for and on behalf of herself and others, devisees in trust under the will of her father, in consideration of the rent and covenants thereafter mentioned to be paid and performed by the defendant, agreed with the defendant, so far as she lawfully could or might, that she and all other necessary parties should and would grant a lease of the farm to defendant, excepting out of the said lease agreed to be made all trees, mines, &c., with liberty of ingress and egress for the intended lessors, for fourteen years, from 11th October then next, at a rent of £346, payable quarterly. And it was thereby agreed, that there should be contained in the lease covenants to repair, the said "intended lessors" finding rough timber; that defendant should not assign without license; that defendant should use the premises agreed to be demised in a husbandlike and proper manner according to the best system of husbandry practised in that part of the country; that defendant should, during the said term, scour ditches and drains, and make and renew hedges; that defendant would not destroy any trees, nor grow two successive crops of white corn or grain on any of the arable land without summer tilting, or taking a green fallow crop; nor sell or suffer to be taken off the premises any of the hay or straw grown, or manure made thereon, but should spend them on the premises. And it was further agreed that the lease should contain a proviso empowering the intended lessors to enter on the premises as of their former estate in case defendant should fail in observing any of the covenants or agreements therein contained; and all other usual and proper covenants in leases of a like nature. It was also agreed that defendant should execute a counterpart of the lease, and defray the expense of the articles of agreement.

The defendant entered into possession at the time fixed for the commencement of the term, and continued to hold and pay the rent until action brought; but no further lease was ever made or executed.

Before the commencement of the action, notice of several breaches of agreement was served on the defendant by the lessor of the plaintiff. One of these, namely, that defendant had taken successive crops of white corn on the same land without summer tilting or green fallow, was satisfactorily proved on the trial, and the plaintiff had a verdict, subject to a motion for a nonsuit on the grounds hereafter stated.

In the following term, *B. Andrews* obtained a rule *nisi* in pursuance of the leave reserved.

Kelley now showed cause, but was stopped by the court.

B. Andrews and *Gunning*, contra.

LORD DENMAN, C. J. In this case the defendant was let into possession under an agreement, which gave the parties a right to go into equity to compel the execution of it by making out a formal lease. Under such circumstances it has long been the uniform opinion of Westminster Hall, that the tenant in possession holds upon the terms of the intended lease. One of these terms was, that the lessee should not take successive crops of corn, and that the lessor should have power to re-enter on the breach of such agreement. This agreement and proviso apply to the yearly tenancy of the defendant. It has been argued, that the terms of the lease cannot be applied to the parol tenancy, inasmuch as some of them, such as the agreement for repairs, are not usually considered as applicable to such tenancy. Whether the obligation to repair can be enforced under such circumstances, at least as to substantial repairs, may perhaps be questionable; but at all events, the agreement as to cropping the land is one which is consistent with a yearly tenancy.¹

PATTESON, J. In *Mann v. Lovejoy*, Ry. & M. N. P. C. 355, though the facts differed from those of the present case, yet, in principle, the ruling of Abbott, C. J., is in favor of the plaintiff. It is said, that a covenant respecting the rotation of crops cannot be engrafted on a yearly tenancy; but I see no reason why it should not. The tenant in possession under such circumstances is bound to cultivate the land, as if he were going to continue in possession as long as the lease itself would have lasted. It is argued, that the tenancy arises by operation of law upon the payment of rent, and that the law implies no particular mode of cropping, nor any condition of re-entry. But the terms upon which the tenant holds are in truth a conclusion of law from the facts of the case, and the terms of the articles of agreement; and I see no reason why a condition of re-entry should not be as applicable to this tenancy as the other terms expressed in the articles.

WILLIAMS, J. It is admitted, that, if this were a case of holding over, the terms of the written agreement would apply. In principle, there is no distinction between that case and the case of a tenant who enters and pays rent upon the faith of an executory agreement for a lease.

*Rule discharged.*²

¹ But see *Richardson v. Gifford*, 1 A. & E. 53 (1834).

² See *Hyatt v. Griffiths*, 17 Q. B. 506 (1851); *Martin v. Smith*, L. R. 9 Exch. 60 (1874).

BRAYTHWAYTE v. HITCHCOCK.

EXCHEQUER. 1842.

[Reported 10 M. & W. 494.]

DEBT for rent. The first count of the declaration stated a demise, on the 26th of October, 1840, from the plaintiff to William Hitchcock, of a messuage and premises, to hold for one year from the 25th of December then last, and so on from year to year if the plaintiff and the said William Hitchcock should respectively please, at the annual rent of £140, payable quarterly on &c.: that, during the said tenancy, to wit, on the 17th July, 1841, all the estate and interest of the said W. Hitchcock in the said messuage and premises came to and vested in the defendant, by assignment from the said W. Hitchcock: and alleged as a breach the nonpayment by the defendant of £35, a quarter's rent due at Christmas, 1841. There was also a count on an account stated.

The defendant pleaded, first, *nunquam indebitatus*; secondly (to the first count), a denial of the demise to W. Hitchcock; and thirdly (to the first count), a denial that the estate and interest of W. Hitchcock vested in him the defendant: on which issues were joined.

At the trial before Lord Abinger, C. B., at the Middlesex sittings after last term, the plaintiff put in evidence an agreement, dated the 17th December, 1840, and signed by the plaintiff only, whereby the plaintiff agreed to execute a lease of a cottage, &c. to W. Hitchcock, for seven years, at a yearly rent of £140, payable quarterly. It was proved that no lease had been executed in pursuance of the agreement, but that W. Hitchcock had entered into possession of the cottage shortly after the date of the agreement, and had paid two quarters' rent up to Midsummer, 1841, at the rate of £140 a year. The plaintiff then proved a notice to the defendant to produce a deed of assignment, bearing date the 17th July, 1841, of the cottage, from W. Hitchcock to the defendant: and on its nonproduction, called a witness, who produced a paper which he said was a true copy of the original assignment, which he had read and compared with it. It was objected that this copy could not be read in evidence for want of a stamp; but the Lord Chief Baron overruled the objection, and the copy was read: from which it appeared, that by the deed of assignment, which was executed both by W. Hitchcock and the defendant, after reciting the agreement of the 17th December, 1840, and that no lease had been executed in pursuance thereof, W. Hitchcock assigned to the defendant, his executors, &c., all the said agreement, and all benefit and advantage thereof, and all his estate, title, and interest therein, to hold to the defendant, his executors, &c., absolutely, subject nevertheless to a proviso for redemption. It was contended for

the defendant, that there was no sufficient evidence of a demise whereby a tenancy from year to year was created, as alleged in the declaration. The Lord Chief Baron overruled the objection, and the plaintiff had a verdict for £35, leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no sufficient evidence of the assignment.

Erle now moved accordingly for a rule to enter a nonsuit, and also for a new trial, on the ground that there was no sufficient evidence of a tenancy from year to year between the plaintiff and W. Hitchcock, or of the assignment of such an interest to the defendant. — First, the copy of the assignment was inadmissible for want of a stamp. The Stamp Acts, 44 Geo. 3, c. 98, sched. A, and 48 Geo. 3, c. 149, sched. I, part 1, impose a duty upon “every copy attested to be a true copy, in the form which hath been commonly used for that purpose, or in any other manner authenticated or declared to be a true copy, or made for the purpose of being given in evidence as a true copy, of any agreement, contract, bond, deed, or other instrument of conveyance, or any other deed whatsoever:” and there is a proviso, that all copies which shall at any time be offered in evidence, shall be deemed to have been made for that purpose. A stamp is therefore required for every copy of an instrument, before it can be read in evidence as such copy; the only exception to the rule being where the document is not read or receivable as such, but is used merely as a memorandum to refresh the memory of a witness.

Secondly, under the agreement recited in the deed, W. Hitchcock was a mere tenant at will, no lease having been executed, and there was not sufficient evidence from which to infer a demise from year to year, as alleged in the declaration. He had therefore no assignable interest in the premises. He referred to *Brashier v. Jackson*, 6 M. & W. 549.

LORD ABINGER, C. B. I think the evidence was sufficient to shew a tenancy from year to year, under the agreement, which was duly executed by the plaintiff; the cases which have been decided on this point go fully that length. Here there is the additional fact of an admission under the defendant's hand, in the deed of assignment, that an agreement for the lease was executed by the plaintiff. But the plaintiff's case does not rest solely on the agreement to let; there is the fact of William Hitchcock having been in the possession of the cottage for more than a year, and having paid two quarters' rent under the agreement. William Hitchcock had therefore an assignable interest, which passed to the defendant under the deed proved at the trial. As to the other point, I think the provisions of the Stamp Acts relate only to such copies as are evidence *per se*, and that the word “copy” there means an *authenticated* copy, receivable as evidence in the first instance. Here the copy was evidence, only because the party who produced it had compared it with the original, and swore to the contents of it, word for word.

PARKE, B. I am of the same opinion. Although the law is clearly settled, that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will; yet it has been held that if he subsequently pays rent under that agreement, he thereby becomes tenant from year to year. Payment of rent, indeed, must be understood to mean a payment with reference to a yearly holding; for in *Richardson v. Langridge*, 4 Taunt. 128, a party who had paid rent under an agreement of this description, but had not paid it with reference to a year, or any aliquot part of a year, was held nevertheless to be a tenant at will only. In the present case, there was distinct proof of the payment of rent for two quarters of a year. There is the additional fact of an occupation for more than a year; but in the case of *Cox v. Bent*, 5 Bing. 185; 2 M. & P. 281, where a party, under an agreement for a lease, had occupied for more than a year, the Court held that a tenancy from year to year existed, not on the ground of the occupation, but because the party had during that occupation paid a half-year's rent. I think, therefore, the fact of such a payment was the stronger evidence in this case, and that William Hitchcock may be taken to have been a yearly tenant. Then, as to the question whether there has been a due assignment of such his interest, I think it is clear that there has; because, although the deed in its commencement recites only the agreement, the operative part of it conveys and assigns "all that the hereinbefore recited agreement of the 17th of December, 1840, and all benefit and advantage thereof, and all that and those the said messuage or tenement and premises at &c., and all the right, title, interest, property, claim, and demand whatsoever, at law or in equity, of him the said William Hitchcock in the said premises," &c. On the other point, I quite agree with my Lord Chief Baron that no stamp was requisite, inasmuch as, though the document might in form have been read as a copy of the original, it was in truth read only as a memorandum to refresh the memory of the witness, who had compared it with the deed.

GURNEY, B., concurred.

ROLFE, B. If we look to the context of the schedule to the Stamp Act, it is evident that the word "copy" is not used in the ordinary sense; for a high rate of duty is first imposed on copies authenticated or attested for the security or use of any person being a party thereto, or taking any benefit or interest immediately under it; and afterwards a lower rate of interest is imposed, where the copy is made for the use of any other person not being a party thereto, or taking such interest or benefit.

*Rule refused.*¹

¹ Cf. *Jackson d. Livingston v. Bryan*, 1 Johns. 323 (N. Y. 1806); *Brant v. Vincent*, 100 Mich. 426 (1894).

DOUGAL v. MCCARTHY.

COURT OF APPEAL. 1893.

[Reported [1893] 1 Q. B. 786.]

APPEAL from the judgment of *Hawkins, J.*, at the trial without a jury.

The action was for two quarters' rent of premises alleged to be in arrear.

The facts were, so far as material, as follows:—

By an agreement made in February, 1891, between the plaintiff (hereinafter referred to as "the landlord") of the one part, and certain persons, directors of the National Press Association, Limited, of whom the defendant was one (hereinafter referred to as "the tenants") of the other part, the landlord agreed to let, and the tenants for themselves and their assigns, and as a separate and personal agreement each of them for himself and his assigns, agreed to take, certain rooms at No. 62, Strand, for one year commencing on February 1, 1891, at the rent of 140*l.*, payable by four equal quarterly payments in advance on February 14, May 14, August 14, and November 14. The tenants entered and occupied the premises under such agreement. After the expiration of the year ending February 1, 1892, they remained in possession of the premises.

On February 25, the plaintiff wrote to the secretary of the National Press Association, asking for a cheque for 35*l.* for a quarter's rent due on the 1st instant. No answer was sent to that letter, and the tenants remained in possession. On March 26 the secretary wrote to the plaintiff: "I am instructed by Messrs. McCarthy and" (mentioning the names of the other tenants) "to inform you that it is their intention to discontinue their present tenancy of the offices at 62, Strand, London, at present occupied by them for the purposes of this company, and I am directed to give you notice that they will not continue same beyond the period required under their agreement. I shall of course be glad if you can see your way to take up the premises on May 14, or even earlier. We shall of course give you every facility for the securing of a new tenant, and I am sure you will meet us in the same spirit." In answer to this letter the plaintiff's solicitors wrote on March 31 as follows: "Mr. Dougal has handed us your letter, giving notice to give up No. 62, Strand, London, which notice will expire on February 1, 1893. Our client will be ready to meet you, if you have an assignee of the premises, or will be happy to consider a surrender of the present term, if other suitable terms are submitted. We are instructed to ask you to be good enough to pay us the quarter's rent due February 1, and shall be obliged by a remittance at your early convenience."

No answer was sent to this letter. On May 23 the action was commenced. The learned judge was of opinion that the facts did not shew that there had been an agreement for a tenancy from year to

year after February 1, 1892. He therefore gave judgment for the defendant.¹

J. E. Bankes, for the plaintiff.

J. W. McCarthy, for the defendant.

J. E. Bankes, in reply.

LORD ESHER, M. R.² I cannot agree with the decision of the learned judge. There seems to be no dispute as to the facts of this case. The defendant and others became tenants to the plaintiff of certain premises for a year ending February 1, 1892, under an agreement, which contained certain terms, amongst others, as to the amount and the time of payment of rent. The year came to an end, and the tenancy under the agreement accordingly expired by effluxion of time. The tenants, however, remained in possession of the premises. The evidence appears to me clearly to shew that the landlord consented to their so remaining in possession as tenants; and that he treated them as tenants from year to year on the terms of the previous tenancy, i. e., at the same rent payable at the same periods as before; for on February 25, he wrote to them demanding a quarter's rent on that footing. After that letter they still remained in possession, and on March 26 they wrote him a letter, the effect of which I will deal with presently. I take it that the doctrine laid down by Lord Mansfield in *Right v. Darby*, 1 T. R. 159, is correct. He there said: "If there be a lease for a year, and, by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year." Here there is the landlord's consent, and the fact that the tenants remained in possession after the letter written by him. I take it that it would be a question for a jury in such a case, whether there was the consent of both parties that the tenant should remain in possession after the termination of the expired tenancy. If the tenant under such circumstances remained in possession without saying anything, I should say that a jury ought to conclude that he consented to continue in possession as tenant. If the tenant remained in possession, but made some statement inconsistent with his remaining as tenant—for instance, if he said that the property belonged to him, or if he defied the landlord to do his worst, and said that he would not go out till he was turned out—in that case I should think the jury would say that he did not consent to remain in as tenant, and was a mere trespasser. I do not think that it is necessary, for the purposes of this case, to determine the question whether, if the tenant, though consenting to remain as tenant, nevertheless made some stipulation inconsistent with the notion that he was remaining in possession as

¹ It will be observed that there was no claim as for use and occupation. The defendant was willing to pay as for use and occupation up to May 14; but the plaintiff's contention was that a tenancy from year to year had been created on the terms of the old lease, and he claimed for rent accordingly.

² The concurring opinions of *Lopes* and *A. L. Smith*, L.J.J. are omitted.

tenant from year to year on the terms of the old lease, that inconsistency would justify the jury in saying that that which would otherwise be the implication of law was done away with. But, if after the expiration of a lease the jury find that by consent of both parties the tenant remained in possession as tenant, and nothing was said inconsistent therewith, the implication of law mentioned by Lord Mansfield arises, viz., that there is a tenancy from year to year on the terms of the old lease so far as they are consistent with such a tenancy. Buller, J. in *Right v. Darby*, 1 T. R. 159, in effect laid down the law in the same way as Lord Mansfield. He said: "It is taken for granted by the counsel for the plaintiff that the rule of law, which construes what was formerly a tenancy at will of lands into a tenancy from year to year, does not apply to the case of houses; but there is no ground for that distinction. The reason of it is that the agreement is a letting for a year at an annual rent; then, if the parties consent to go on after that time, it is a letting from year to year."

Therefore, if there is the consent of both parties that the tenant shall remain in possession as tenant, and nothing is said to rebut that inference of law, it is by law a tenancy from year to year on the terms of the old tenancy, so far as applicable. Here there was evidence to shew that the landlord consented to the tenants remaining in possession, and that the tenants also consented to remain in possession, as tenants. I should have said that the mere fact of their holding over as they did was evidence on which a jury ought to infer that they agreed to remain in possession as tenants, for I do not think the jury ought to infer that they intended to remain in possession as trespassers. But in this case the evidence goes further. In the letter of March 26, the tenants' secretary says that it is their intention "to discontinue their present tenancy." The original tenancy was over, so that this language could only refer to a fresh tenancy. Then he says that he is instructed to give notice that they will not continue the same beyond the period required under their agreement, and proceeds: "I shall of course be glad if you can see your way to take up the premises on May 14, or even earlier." What do the expressions so used mean? They seem to me to admit that, if they have assented to a tenancy, such tenancy is in law a tenancy from year to year, and to give notice to determine such tenancy at such period as it may be determinable by law, but to request the landlord, if he can see his way to it, to take the premises off their hands sooner. Such language is quite inconsistent with the notion that they had a right to put an end to the tenancy when they pleased, and therefore that it was a tenancy at will. Therefore, so far from this letter being inconsistent with the implication of law that they had consented to remain in possession as tenants from year to year, it seems to me clearly to admit that such was the case.

I think that the proper inference from the facts is that they consented to remain tenants, and did not attempt to impose any term inconsistent

with the tenancy which the law would imply from such consent, viz., a tenancy from year to year on the terms of the old tenancy so far as consistent with a tenancy from year to year. I think the term for payment of rent in advance was not inconsistent with such a tenancy, and therefore I think that the plaintiff was entitled to recover the rent which he claimed. For these reasons I think that this appeal should be allowed.¹

ELLIS v. PAIGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1822.

[Reported 1 Pick. 48.]

THIS was an action of trespass *quare clausum fregit*.

At the trial before *Wilde, J.*, in May Term, 1821, the plaintiff introduced evidence tending to prove that in April, 1819, Paige, as the agent of one Bond, leased to the plaintiff by parol a parcel of land, with a dwelling-house standing thereon, in Ware, for the term of one year, reserving rent; that Ellis thereupon went into possession; and that on the 30th of September, Paige forcibly entered into the dwelling-house, and with the aid of the other defendants, without the consent, and against the will of the plaintiff, removed the wife and the property of the plaintiff therefrom into the highway. The plaintiff attempted also to prove that the door of the house was broken by Paige, but there was some reason to believe that it was first partially opened by the wife of the plaintiff, and that Paige, taking advantage of this partial opening, forcibly effected his entrance without any actual breaking. It appeared that either on the 17th, or on the 20th of September, Paige, as the agent of Bond, gave notice to the plaintiff to quit the demised premises.

Upon this evidence the jury were instructed, that if they believed that the door of the house was found by Paige wholly or partly open, so that he entered without any actual breaking, the plaintiff was not entitled to recover:—that under the Statute of this Commonwealth, this parol lease for a year was to be considered as a lease at will, and the will of the lessor having been determined by the notice to quit, trespass *quare clausum* could not be maintained by Ellis for any entry by the landlord, or his agent, subsequent to this notice; and though within a reasonable period after the determination of the tenancy at will, the tenant might be entitled to free ingress and egress for the purpose of effecting his removal, or, in other words, to reasonable notice to quit, yet what notice was reasonable, was a question of law:—and that the notice which had been proved, whether given on the 17th, or the 20th of September, was reasonable notice.

The jury found a verdict for the defendants. If these instructions were incorrect, a new trial was to be granted.

¹ See *Roe d. Jordan v. Ward*, 1 H. Bl. 97 (1789).

The case was argued at September Term, 1821, and continued for advisement.

Strong, for the plaintiff.

E. H. Mills and *Howe*, for the defendants.

The opinion of the court was delivered at April Term, 1823, at Northampton, by.

WILDE, J. The first question to be determined is, whether a parol lease for a year is valid according to the terms of it, or whether it is an estate at will only.

By the Statute of 1783, c. 37, § 1, it is enacted, that all leases by parol, and not put in writing and signed by the parties so making the same, shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect.

The language of the Statute is plain and unambiguous, and when such is the case, the will of the legislature must be obeyed. That will could not have been expressed with more perfect clearness. But it has been argued that a judicial construction has been given to an English Statute nearly similar, (29 Car. 2, c. 3,) according to which it is held by the courts there, that parol leases for an uncertain time, with the reservation of an annual rent, may be good as leases from year to year, notwithstanding the Statute. And it is said that the legislature here, in adopting the same language, must have intended to adopt the same construction. This argument would have weight, if the two Statutes were in all respects similar.

But there is an exception in the English Statute, in favor of parol leases not exceeding the term of three years, which was adopted here in the provincial St. 4 W. & M. The omission of it in the Statute now in force, shows plainly the intent of the legislature, to place all parol leases on the same footing.

It is a well settled rule, that when any Statute is revised, or one Act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance; which is altogether inadmissible. We are not therefore at liberty to suppose that the proviso or exception in the provincial Statute was omitted by mistake; and if not, then clearly it was the intention of the legislature, to place all parol demises on the same footing; for such is the obvious import of the language of the Statute of Frauds.

That the doctrine as to tenancies from year to year, depends upon the exception in the English Statute, appears to me very clear, although but little is to be found in the books on this point. In the case of *Legg v. Strudwick*, 1 Salk. 414, it was decided that a parol demise *habendum de anno in annum, et sic ultra, quamdiu ambabus partibus placeret*, was a lease for two years, and from year to year after; so that if the tenant holds on after the two years, he is not tenant at will, but for a year certain.

The court say, "that his holding on after the two years must be taken to be an agreement to the original contract, and in execution of it. And such an executory contract," they say, "is not void by the Statute of Frauds, though it be for more than three years; because there is no term for above two years ever subsisting at the same time." The plain inference is, that but for the exception in the Statute, the lease in that case would have been held a lease at will only. The doctrine, as to tenancies from year to year, was introduced long before the Statute of Frauds. In the case of *Doe v. Porter*, 8 D. & E. 16, Lord Kenyon says, "The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. And in order to obviate them, the courts very early raised an implied contract for a year, and added, that the tenant could not be removed at the end of the year without receiving six months' previous notice." At first a lease without limitation of time, and with the reservation of an annual rent, was considered as a lease for a year certain. This was better than the old tenancy at will, but still inconvenient, because the tenant might be compelled to quit at the end of the year without notice. *Timmins v. Rowkinson*, 1 W. Bl. 533; s. c. 8 Burr. 1609. Then followed tenancies from year to year, which were found most convenient, as the estate could not be suddenly determined, nor without six months' notice to quit. Thus stood the law at the time the English Statute of Frauds was penned, and the exception was introduced, no doubt, for the purpose of supporting short parol leases, and tenancies from year to year depending on implied contracts. But whether this be so or not, it is very clear, that the English doctrine respecting tenancies from year to year can only be supported by the exception in the Statute, and that by our Statute there can be no tenancy from year to year, unless by a lease in writing. But the case under consideration, is not a case of tenancy from year to year, even according to the English doctrine. It is a case of a parol demise for a year certain; and in England, and in New York, where the law is the same, such a parol demise would be valid. If the tenant should hold over after the year, he would then be tenant from year to year, and would be entitled to notice.

If there be a lease for a year, and by consent of both parties, the tenant continues in possession afterwards, the law implies a tacit renovation of the contract. The plaintiff therefore would not by the law of England be entitled to notice to quit.

Where a lease is determinable at a certain time, no notice to quit is necessary; because, says Lord Mansfield, both parties are equally apprised of the determination of the term. *Messenger v. Armstrong*, 1 D. & E. 54; *Bright v. Darby*, 1 D. & E. 162. All that is said therefore about tenancies from year to year, and the necessity of a notice to quit in every such tenancy, is not applicable to the present case.

2. The next question to be considered, is, whether a tenant at will is entitled to notice to quit.

I hold that he is not; and this is the principal objection to a tenancy at will. Notice to quit is frequently given, and is one way of determining the lease; but not the only one. It may be determined by the entry of the lessor on the land, and his exercising any act of ownership inconsistent with the nature of the estate; or by the death or outlawry of either landlord or tenant. And either party may determine the estate whenever he pleases.

This is clearly the law, notwithstanding the case of *Parker v. Constable*, 3 Wils. 25, which is a short and imperfect report. I presume that was a tenancy from year to year: for at the time it was decided (10 Geo. 3), the old tenancy at will had in England become obsolete. It existed only notionally, as Wilmot, J., said long before. If this is not a satisfactory explanation of that case, it is sufficient to add, that it is opposed to the whole current of the authorities. In the case of *Phillips v. Covert*, 7 Johns. Rep. 1, Kent, C. J., says, "that tenancies at will are held to be estates from year to year, merely for the sake of a notice to quit; as to every other purpose they are regarded as mere tenancies at will." And with this agree all the *dicta* of the English judges. Thompson, J., says that it has been settled in New York, that notice to quit is not necessary to a tenant at will. *Jackson v. Bryan*, 1 Johns. Rep. 323. And Spencer, J., says, that whether notice to quit in that case was necessary, depended on the question, whether the estate was a tenancy at will, or for years. Tomkins, J., it is true inclined to the opinion, that a tenant at will is entitled to notice to quit; and he relies on the case of *Parker v. Constable*, which he says he did not find had been overruled. And it ought not to be, if it is to be understood as I have supposed it might be. He refers also to the case of *Rigge v. Bell*, 5 D. & E. 471; but that case will not warrant the conclusion he seems to draw from it. Notice to quit was not held necessary in that case on the ground that the defendant was tenant at will, but because by the terms of the lease he was to hold for a time certain. It was a case of a parol demise for the term of seven years, which the court held void by the Statute of Frauds, as to the duration of the lease, but good as to the other terms of it. One of these terms was, that the defendant should quit at Candlemas, and the court decided, that if the lessor chose to determine the tenancy before the expiration of the seven years, he could only put an end to it at Candlemas. This was the only point decided in that case. In the case of *Jackson v. Laughhead*, 2 Johns. Rep. 75, it was decided by a majority of the court, against the opinion of Thompson, J., that in ejectment against a mortgagor, notice to quit was necessary. This was never held to be law in this State; nor is it the law of England.

Lord Mansfield says, in the case of *Keech v. Hall*, Doug. 21, that "when the mortgagor is left in possession, the true inference to be drawn, is, an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit." The same doctrine is laid down by Lord Ellenborough in the case of

Thunder v. Belcher, 3 East, 449; and such I think is unquestionably the law. A mortgagor is not entitled to emblements, much less to six months' notice to quit.

It appears, therefore, from a review of all the authorities, that an estate at will may be determined without previous notice; that the inconvenience arising from this principle of the common law, led in England to the introduction of the tenancy from year to year; and that notice to quit, as practised there, is required only in relation to the latter estate.

3. The question then is, whether, when an estate is determined by the lessor, the lessee is obliged immediately to quit, or may be forcibly expelled.

We are all of opinion that the law does not impose on the lessee these hard terms.

The lessee is entitled to the emblements, and a reasonable time is allowed to him for the purpose of removing his family, furniture, and other property. If the lessor disturbs him in the exercise of this right, an action will lie for the lessee. This principle was recognized in the case of *Rising v. Stannard*, 17 Mass. Rep. 287, and is well established. A contrary doctrine would be extremely harsh and unreasonable.

4. Nothing further then remains to be considered, except the question, whether there was, in this case, sufficient and reasonable time allowed the tenant to remove: and this we have found to be a question of no small difficulty. There being no rule established, each case must depend on its own peculiar circumstances. This, to say the least of it, is inconvenient. No right which is capable of being defined and limited, ought ever to depend on the discretion of the judges; the exercise of which necessarily leads to uncertainty, which is commonly productive of more difficulty than even the operation of a bad rule. It is for this reason that the court adopts rules of practice, instead of exercising its discretion in each particular case.

We shall hereafter probably find it necessary to frame some rule applicable to cases of this sort; should we not be prevented by the intervention of the legislature, whose unlimited power to change and modify the law would enable them most effectually to provide a remedy for existing inconveniences and difficulties. These probably were not foreseen when the provincial Statute was revised; and perhaps the operation of the exception or proviso in that Statute was not well understood or considered. At that time the doctrine of leases and tenancies at will was not familiar in practice, and the exception itself is somewhat obscure.

This case, however, must be decided by the law as it now is; and a majority of the court think that a reasonable time was not given to the tenant to remove, and that for this reason a new trial must be granted. What will be the opinion of the court after another trial cannot be now determined. On a fuller report of the case on this point, perhaps the

court may be of opinion that time enough was allowed. This must depend on the circumstances of the case, which do not at present sufficiently appear by the report. *New trial granted.*¹

BARLOW v. WAINWRIGHT.

SUPREME COURT OF VERMONT. 1849.

[Reported 22 Vt. 88.]

ASSUMPSIT for the use and occupation of a store in Burlington. Plea, the general issue, and trial by the court, September Term, 1847, — *Bennett, J.*, presiding.

It appeared on trial, that the plaintiff was the owner of the store in question, and that the defendant, on the twenty-second day of July, 1841, hired it of the plaintiff, by parol agreement, for the term of five years, commencing from the first day of April, 1841, at an annual rent of \$125.00, one half payable on the first day of April and the residue on the first day of October in each year; that the defendant took possession of the store, under that agreement, and remained from two to four months, one Carlos Wainwright having charge of the store as his agent; that the defendant then formed a co-partnership with one Alonzo A. Wainwright, under the firm of E. & A. A. Wainwright, and the firm occupied the store for about two years, the rent being paid from the funds of the firm, during that time, by Carlos Wainwright, who still continued to have charge of the store, — but there was no evidence of any new agreement having been made between the plaintiff and the firm of E. & A. A. Wainwright in reference to the store; that then the firm of E. & A. A. Wainwright was dissolved, and the business at the store passed again into the hands of the defendant, and he occupied the store, without any new agreement, at the same rent, until the twenty-first or twenty-second day of July, 1844; that the defendant then left the store, and, on the twenty-second day of July, 1844, tendered to the plaintiff the possession and the key, and paid all the rent due to that day, but nothing beyond it, at the rate of \$125 per year; and that the plaintiff then declined to receive the possession of the store, and it remained vacant from that time until the twenty-eighth of November, 1844, when the plaintiff leased it, at a rent of \$135.00 per year, to another person, who went into the possession. It appeared, that during all the time the store was occupied as above stated, the

¹ JACKSON and PUTNAM, JJ., were of opinion that notice to quit was necessary. The opinion of Mr. Justice Putnam is given in a note to *Coffin v. Lunt*, 2 Pick. 70, 71. As to the law in Maine, see *Davis v. Thompson*, 13 Me. 209 (1836); *Young v. Young*, 36 Me. 133 (1853); *Withers v. Larrabee*, 48 Me. 570 (1861); *Esty v. Baker*, 50 Me. 325 (1862); *Seavey v. Cloudman*, 90 Me. 536 (1897).

rent had been paid semi-annually, on the first days in April and October in each year.

Upon these facts the plaintiff claimed to recover the rent of the store from the twenty-second day of July to the twenty-eighth day of November, 1844, during which period the store had remained vacant. The court decided, that the plaintiff was entitled to recover the rent from the twenty-second day of July to the first day of October, 1844, at the rate of \$125 per year, and rendered judgment accordingly. Exceptions by defendant.

Smalley and Phelps, for defendant.

C. Russell, for plaintiff.

The opinion of the court was delivered by

BENNETT, J. It seems from the bill of exceptions, that the defendant hired of the plaintiff his store, by a verbal contract, for the period of five years from the first of April, 1841, at an annual rent of one hundred and twenty-five dollars, payable semi-annually, on the first days of April and October in each year, and that the defendant went into possession, under the parol agreement, and the occupancy was continued until the twenty-first or twenty-second of July, 1844, when the defendant quit the possession of the store, and offered to give up the key and the possession to the plaintiff, which the plaintiff then declined to receive. The store remained vacant until the twenty-eighth of November, 1844, when the plaintiff leased it to another person, at an increased rent of ten dollars, who went into possession under his lease. The case further finds, that the rent had been semi-annually paid, on the first days of April and October, until the time when the defendant quit the possession in July, 1844. The County Court held, that the plaintiff should recover that portion of the half year's rent, falling due the first of October, 1844, which had not been paid; to which the defendant excepted.

Though in the court below the plaintiff claimed to recover rent to the time, when he took possession by his tenant, that is, to the twenty-eighth of November, 1844, yet there is no exception on his part; and the County Court, in disallowing the rent to the extent claimed, probably proceeded upon the ground, that the rent could not be *apportioned*. The correctness or incorrectness of such an opinion we are not now called upon to revise.

The only question now is, has the defendant any ground, upon which he can assign error. We think not. It is true, the Revised Statutes, chap. 60, § 21, declare, that all interests or estates in lands, created without any instrument in writing, shall have the force and effect of estates at will *only*; yet we think, that this estate, when once created, may, like any other estate *at will*, by subsequent events, be changed into a tenancy from year to year. In the case before us the lessee entered into possession, and the possession was continued from year to year, until July, 1844, and the rents semi-annually paid by the lessee and accepted by the landlord. From these facts a new agreement may

well be presumed, and the estate, which was originally created by the Statute as an estate *only at will*, expands into a holding from year to year.

This is the settled doctrine of the English courts, under their Statute of Frauds, which enacts, that all parol leases of land shall have the force and effect of leases or estates *at will only*. See *Bigge v. Bell*, 5 T. R. 471. *Clayton v. Blakey*, 8 T. R. 3. *Doe v. Weller*, 7 T. R. 478. *Roe v. Rees*, 2 Bl. R. 1171. See, also, 2 Cow. 660, and 8 Cow. 227, in which the courts of New York declared the law of that State to be the same. We think the words of our Statute are satisfied by holding, that, *in the first instance*, the estate created in the present case was an estate at will, and only an estate at will, yet that it should inure, like other estates at will, and have the incidents common to an estate at will, one of which is its *convertibility* into a holding from year to year by the payment of rent. To go farther, and hold, that the estate, created under the Statute as an *estate at will*, must ever remain such, would be to go beyond the Statute, and evidently contravene its provisions, rather than obey them. The expression in the Statute, "shall have the force and effect of estates at will only," evidently implies, as we think, that they should in every respect inure as a lease at will.

This question is not altogether new in this State. In the case of *Hanchet v. Whitney*, 2 Aik. 240, it was held, that an estate at will created, under the Statute then in force, by means of a parol lease, having run for a period of five years, was converted into a tenancy from year to year. The provision of the Statute of 1797, then in force, was in effect the same as our present Statute.

We do not discover, that the sixth section of chapter 60 of the Revised Statutes, page 312, to which the court have been referred, has any special bearing upon the question. The provision in that section, that any lease for more than one year shall not be good and effectual against any other person than the lessor and his heirs, unless the same has been acknowledged and recorded, answers to a like provision in the fifth section of the Statute of 1797. The provisions of the Statute are the same as to deeds which remain unacknowledged and unrecorded.

I am aware, that in Massachusetts, in the case of *Ellis v. Paige et al.*, 1 Pick. 43, and in *Hollis v. Pool*, 3 Met. 551, it was held, that under their Statute of 1793 a person entering under a *parol* lease for any certain time shall not, even after occupation and payment of rent, be treated as a tenant from year to year, but shall at all times be regarded as a tenant at will. The Statute of Massachusetts is very similar in its phraseology to our Statute of 1797. It enacts, that parol leases shall have the effect of leases or estates *at will only*, and shall not, at law or equity, be deemed or taken to have any other or greater force and effect. Though the Statute of that State, as well as the Statute of this State, is decisive against the creation of a tenancy from year to year in the first instance, yet I do not see, how the reasoning of the court in those cases applies against the growth of an estate at will, created under the Statute, into a tenancy from year to year.

It is true, the English Statute of Frauds has an exception, as to leases not exceeding the term of three years; and this is dwelt upon by the court of Massachusetts, as a reason why the decisions of the courts in England, under their Statute, should not furnish a rule for them. I must confess, that I do not see the force of the reasoning of the court, which would prevent an estate at will from being turned into a tenancy from year to year in Massachusetts, and allow it under the English Statute. In the case of *Hanchet v. Whitney* it was not supposed, that our Statute of 1797 would have any other or greater effect, than the English Statute, and that both alike, in the first instance, declared that the estate created by a verbal lease was only an estate at will, unless it came within the exception of the English Statute, and that under our Statute it might be turned into a tenancy from year to year, as well as in England. The court of Maine, in the case of *Davis v. Thompson*, 18 Maine, 214, under a similar Statute, have followed the Massachusetts cases; but no new views on the question are presented, and for myself I cannot coincide with those cases.

It is said by Tindal, C. J., in 7 Bing. 458, that "if a party enters and pays rent, a new agreement may be presumed," and that this is the ground of turning the tenancy into a holding from year to year. See, also, *Cox v. Bent*, 5 Bing. 185. In such case the tenant is entitled to six months' notice, ending with the expiration of the year; and without this the landlord cannot eject him. From this it should follow, that the defendant could not, at any time during the year, at pleasure, surrender the premises against the will of his landlord, and thus excuse himself from the payment of accruing rent.

But suppose we regard the continuing interest of the defendant in the store to be still only that of a tenant at will, does it follow, that the defendant could have the right at any time, *without previous notice*, to determine his estate, and thus excuse himself from all liability to accruing rents? And could he especially do it in this case, at least, until the six months' rent, to become due the first of October, 1844, had fully accrued? He had seen fit to hold over after the first of April, 1844, and could he determine his estate, while the next six months were running, and thereby acquire the right to apportion the six months' rent then accruing? But for myself I do not deem it important to recur to this ground. I am fully satisfied to treat it as a tenancy from year to year.

It is no defence in this case, that the defendant abandoned the possession of the store. If the tenancy remained undetermined, he is liable for rent, whether he in fact occupied the store, or not. 3 Steph. N. P. 2724. *Redpath v. Roberts*, 3 Esp. R. 225. The plaintiff, however, cannot claim rent from this defendant after his lease of the twenty-eighth of November, 1844; and the County Court limited his right to recover rent ending with the six months' rent due the first of October, 1844, and this, no doubt, upon the ground, that the plaintiff could not determine the tenancy, while the next six months were running, and

thus acquire the right of *apportionment*. The plaintiff re-possessed himself of the store by and through his new tenant.

The fact, that the defendant, after having been in possession a few months, took a partner in the business carried on in the store, cannot alter the case. No new agreement was made, in relation to the occupancy of the store, with the plaintiff. The partner of the defendant might well be considered, for the time being, as in under him, at least, as a *quasi* tenant. Besides it appears, that after about two years the partners dissolved their connection, and the store was again occupied by the defendant individually.

We then think, the court below were right in their view of the law, and that, although the contract was modified, yet it was not entirely destroyed, and should govern the rights of the parties, as to the amount of rent, and the times when the same became payable. See *Schuyler v. Leggett*, 2 Cow. 660.

The result is, the judgment of the County Court is *affirmed*.¹

CURTIS v. GALVIN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861.

[Reported 1 Allen, 215.]

TORT for entering the plaintiff's dwelling-house, and removing his furniture and ejecting his family therefrom. The defendants proved, in justification, that the defendant Galvin, being the owner of the premises, conveyed them by deed to the other defendant Carney, and that, eight days before the acts complained of, Carney informed the plaintiff thereof, and gave him notice to quit. At the trial in the Superior Court, *Rockwell, J.*, directed a nonsuit, and the plaintiff alleged exceptions. The facts appear more fully in the opinion.

B. F. Butler and *W. P. Webster*, for the plaintiff.

A. V. Lynde, for the defendants.

BIGLOW, C. J. It appears by the testimony of the plaintiff that, in October, 1858, prior to the alleged trespass, the premises from which he was ejected belonged to Galvin. Inasmuch as he offered no evidence of any right to their occupation created by an instrument in writing, he could have no greater title or interest therein than an estate at will. Rev. Sts. c. 59, § 29. On the facts stated in the exceptions, this is the most favorable view which can be taken of his right to the possession and enjoyment of the premises, prior to the conveyance to the defendant Carney. But, on a familiar and well-settled rule of law, this tenancy at will was determined, and the plaintiff became a tenant by sufferance only by the conveyance from Galvin to Carney, the other

¹ See *Hammou v. Douglas*, 50 Mo. 424 (1872); *Hunter v. Frost*, 47 Minn. 1 (1891).

defendant, on the 9th of said October. *Howard v. Merriam*, 5 Cush. 568, 574; *McFarland v. Chase*, 7 Gray, 462.

The evidence offered by the plaintiff to impeach this conveyance, and to show that it was colorable, and was in fact made for the purpose of enabling the said Galvin to eject the plaintiff from the premises, was rightly rejected. The deed was a valid one as between the parties. It passed the title to the premises. The grantor had no power to compel the grantee to surrender the estate conveyed to him. It violated the legal rights of no person. It is true that a creditor of the grantor, who could show that he was thereby hindered, delayed and defrauded of the collection of his debt, or a subsequent purchaser without notice, who could prove that the deed was made with intent to defraud him, might impeach the conveyance, and set it aside on the well-settled principles of the common law as declared in Sts. 13 Eliz. c. 5, § 2, and 27 Eliz. c. 4, § 2. But in such case the deed is valid between the parties; and, with this exception, we know of no rule of law which restrains the owner in fee from the free and unfettered alienation of his estate. It is only an exercise of a legal right, which works no injury to any one, least of all to a person who holds under the grantor. He took his estate or interest in the premises subject to all the legal rights of the owner therein, and must be presumed to have known them, and to have assented thereto. To him, therefore, the maxim *volenti non fit injuria* is applicable. The determination of an estate at will, by an alienation by the owner of the reversion, is one of the legal incidents of such an estate, to which the right of the lessee therein is subject, and by which it may be as effectually terminated as by a notice to quit given according to the requisitions of the Statute. Indeed it is difficult to see upon what ground a deed can be held void, as being colorable or fraudulent, which is made in the exercise of a legal right, and which has no effect on the rights of a third party, who seeks to set it aside, other than that which was necessarily incident to the estate which he held in the premises. The *dictum* of the court in *Howard v. Merriam*, *ubi supra*, cited by the counsel for the plaintiff, was not essential to the decision of that case, and cannot be supported on principle or authority.

It follows that, after the conveyance of the demised premises, the plaintiff became tenant by sufferance only, and could not maintain this action of tort in the nature of trespass *quare clausum* against the defendant Carney, who was the grantee in the deed; nor against the other defendant, who acted under his authority in attempting to eject the plaintiff from the premises. At the time of action brought, it was not the plaintiff's close. A tenant by sufferance holds possession wrongfully. Co. Lit. 57 b, 271 a. The defendants had a full right of entry. *Meador v. Stone*, 7 Met. 147.

*Exceptions overruled.*¹

¹ See *Pratt v. Farrar*, 10 All. 519 (Mass., 1885).

PROVIDENCE COUNTY SAVINGS BANK v. HALL.

SUPREME COURT OF RHODE ISLAND. 1888.

[Reported 16 R. I. 154.]

DEFENDANT'S petition for a new trial.

February 18, 1888. DUFFEE, C. J. This is a petition for a new trial of an action of *assumpsit* for the use and occupation of a small farm with dwelling-house thereon for one year. The action was tried in the Court of Common Pleas. It appeared on the trial that the defendant entered into occupation in 1877, hiring for a year from April 1, 1877, to April 1, 1878, at \$300 per annum, and continued to occupy at the same rent until the year 1883-84; that on October 1, 1883, he received written notice from the plaintiff bank to quit April 1, 1884, but continued, notwithstanding, to occupy until the latter part of November, 1884, when, without written notice to the bank he quitted, leaving the key with a neighbor, from whom he got it when he first entered as tenant. He testified that about April 1, 1884, he saw the treasurer of the bank, who had charge of the letting, and asked permission to remain a few months until a house then building for him could be completed, and that the treasurer refused to give it, saying that it would be an injury to the bank, which wanted to sell, and that in August the bank had a board set up on the premises with "For Sale" painted thereon. He also testified that the farm contained only about thirteen acres, mostly poor land; that he did not plough or plant in 1884, because he expected to leave, and only mowed the lawn in front of the house, getting not over a quarter of a ton of hay. This testimony was not contradicted. He had, however, been accustomed to pay the taxes, and to have the amount deducted from the bill for rent. He paid the tax of 1884.

The bank claimed on this testimony that it was entitled to recover \$300 rent for the year ending April 1, 1885. The defendant contended that under the notice to quit, his yearly tenancy ended April 1, 1884, and that he was not liable for a year's rent for the year ensuing. He asked the court to charge the jury that if they should find that the bank gave the proper notice to terminate the letting April 1, 1884, the letting did then terminate, and the bank, if it did not afterwards recognize him as tenant by taking rent or otherwise, was absolved from giving him further notice, and he was absolved from giving notice to the bank in order to quit legally; and also to charge that if the letting came to an end April 1, 1884, and the bank refused to let further, there could be no yearly letting or tenancy afterwards until a new contract was entered into either by implication or otherwise. The court refused so to charge, but did charge in effect that if the bank delayed to act on the notice to quit for an unwarrantable time, it lost the benefit of it, and could only terminate the letting at the end of

the going year by another notice, and the defendant could only terminate his tenancy in like manner, and left the jury to determine as a matter of fact whether the bank did unreasonably delay. The jury returned a verdict for the bank for a year's rent. The question is, whether the rulings and refusals to rule were erroneous.

The purport of the charge was that, if a tenant from year to year holds over after his tenancy has been terminated by notice to quit, it is optional with the landlord either to follow up the notice by ejectment, or to waive the notice and hold the tenant for another year, whether the tenant actually agrees to it or not. The charge is supported by numerous American cases. *Hemphill v. Flynn*, 2 Pa. St. 144; *Bacon v. Brown*, 9 Conn. 334; *Conway v. Starkweather*, 1 Denio, 113; *Schuyler v. Smith*, 51 N. Y. 309; 10 Amer. Rep. 609; *Witt v. The Mayor, &c. of New York*, 5 Robertson N. Y. 248; also, 6 Robertson N. Y. 441; *Noel v. McCrory*, 7 Cold. Tenn. 628; *Schuisler v. Ames*, 16 Ala. 73; *Wolffe v. Wolff & Bro.* 69 Ala. 549; *Clinton Wire Cloth Co. v. Gardner et al.* 99 Ill. 151; *Tolle v. Orth*, 75 Mich. 298. Some of these cases are very strong. Thus, in *Conway v. Starkweather*, the tenant held over fourteen days, having refused to renew the tenancy before his term expired; in *Schuyler v. Smith*, tenants of a wharf held over twenty-one days, while another wharf was preparing for them, they having given notice before their lease ended that they should not continue the tenancy; in *Wolffe v. Wolff & Bro.* the tenant held ten days after his term expired, under notice previously given that he could not quit at once, but would pay a reasonable rent for the unavoidable occupancy; and in *Clinton Wire Cloth Co. v. Gardner et al.*, the tenants held over eleven days under notice that they should not remain without a reduction of rent; their holding over being in part the result of expectation that the rent would be reduced. It is true that in the cases cited the tenant was in for a definite term; but so long as the letting is terminated, we do not see that it matters whether it be terminated by effluxion of time or notice to quit. In *Schuyler v. Smith* the tenant contended that the relation of landlord and tenant could only be created by agreement, and there could be no agreement without mutuality. The court replied that the tenant held over at his peril, the landlord having the option to treat him as trespasser or tenant for a year longer on the terms of the prior lease so far as applicable, the tenancy arising by operation of law regardless of the tenant's assent. In *Clinton Wire Cloth Co. v. Gardner et al.* the court said that the rule laid down in *Schuyler v. Smith* "is the one established by the current of American decisions." The ground of decision is that when a tenant holds over he presumably holds over for another year, if the prior tenancy was for one or more years; or, if the time was shorter, for another term in case the landlord assents; and he cannot be permitted to overthrow this presumption by setting up that he intended to hold over as a wrongdoer and not as a tenant; and the doctrine is urgently defended on the ground that the tenant being in possession has the landlord at disad-

vantage, and can greatly embarrass or defeat his arrangements for a new letting by holding over, and therefore should not do so without the risk of being held himself.

The English cases are more lenient to the tenant, and hold that by holding over he becomes simply a tenant at sufferance, and cannot be held for another year or term without his assent, express or implied, the question of assent being a question of fact for the jury. *Idbs v. Richardson*, 9 A. & E. 849; *Jones v. Shears*, 4 A. & E. 832; *Waring v. King*, 8 M. & W. 571. The English rule is recognized in Massachusetts and Missouri. *Delano v. Montague*, 4 Cush. 42; *Edwards et al. v. Hale et al.* 9 Allen, 462; *Emmons v. Scudder*, 115 Mass. 367; *Neumeister v. Palmer*, 8 Mo. App. 491. In *Edwards et al. v. Hale et al.* the court held that for the creation of a new tenancy "there must be a new contract, either express or inferable from the dealings of the parties," and remarked that *Conway v. Starkweather* was not well sustained by authority. The remark could not now be repeated very well.

There is no reported decision in this State which is in point. We think it has been generally supposed that where a tenant holds over he is presumed to become a tenant for another year, or, if the prior term was shorter, for another term, if the landlord consents. On the question whether the presumption is rebuttable otherwise than by proving a new contract, we are not aware that there is any prevalent opinion.

We decide, in accordance with what we consider to be the greater weight of American authority, that, if a tenant holds over without any new contract, it is optional with the landlord to treat him either as a trespasser or as tenant from year to year, in case the prior term was for a year or longer; and if the prior term was shorter than a year, then from term to term, according to such shorter term; an election to treat him as tenant, however, being inferable from any unreasonable delay to proceed against him as a trespasser, as well as from words or acts directly recognizing him as tenant. *Conway v. Starkweather*, *supra*; *Moshier v. Reding et al.* 12 Me. 478; *Douglas v. Whitaker*, 32 Kans. 381.

Of course if a tenant remains in possession for some particular time or purpose, by permission of the landlord, he will only be liable, unless he exceeds the permission, for the period of occupation. And so, if the landlord accepts a surrender of the premises from the tenant holding over, the tenant will be liable for rent, or use and occupation, only up to the time of such acceptance. *Petition dismissed.*¹

W. B. Tanner, for plaintiff.

James C. Collins, for defendant.

NOTE. — As to tenancies for periods of less than a year, see *Steffens v. Earl*, 11 Vroom, 128 (N. J. 1878); *Bowen v. Anderson*, L. R. [1894], 1 Q. B. 164; *Tayl. Landl. and Ten.* (9th ed.), § 67.

¹ *Haynes v. Aldrich*, 133 N. Y. 287 (1902); *Mason v. Wierango's Estate*, 113 Mich. 161 (1897), accord. *Cl. Harter v. Mullen*, 150 N. Y. 28 (1899). See also *Stoggs v. Ellis*, 45 Cal. 164 (1872).

CHAPTER VI.

CREATION OF EASEMENTS AND PROFITS.¹

SECTION I.

BY IMPLICATION.

SAUNDEYS v. OLIFF.

QUEEN'S BENCH. 1597.

[Moore, 467.]

TRESPASS. The defendant prescribes for common, and counts that one Verny, Knight, was seised in fee of the messuage and place where &c. and that he granted the messuage with all the commons appurtenant; and avers that all the tenants of the messuage have used to have common in the place where &c. And it is adjudged against him who so prescribed, because there appears to have been unity of possession of the messuage and of the Lower Cow Pasture, (being the place where &c.,) in Verny, in which case the common is extinct, and then cannot pass by words of common appurtenant and regarding the messuage. But "all commons usually occupied with the messuage" would have passed such common as the first was.

NICHOLAS v. CHAMBERLAIN.

KING'S BENCH. 1606.

[Reported Cro. Jac. 121.]

TRESPASS. It was held by all the court upon demurrer, That if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary, *et quasi* appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or

¹ See also 2 Gray, Cas. on Prop. (2d ed.), Bk. V., chapters I. and III., and 3 Gray, Bk. VI., c. 2, § 2.

making them new, as the case may require. So it is, if a lessee for years of a house and land erect a conduit upon the land, and, after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them.

But by POPHAM, Chief Justice, if the lessee erect such a conduit, and afterward the lessor, during the lease, sell the house to one, and the land wherein the conduit is to another, and after the lease determines; he who hath the land wherein the conduit is, may disturb the other in the using thereof, and may break it; because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation and usage of them together by him who had the inheritance. So it is, if a disseisor of an house and land erect such a conduit, and the disseisee re-enter, not taking conusance of any such erection, nor using it, but presently after his re-entry sells the house to one, and the land to another; he who hath the land, is not compellable to suffer the other to enjoy the conduit. — But in the principal case, by reason of the misleading therein, there was not any judgment given.

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CLARK v. COGGE.

KING's BENCH. 1607.

[Reported Cro. Jac. 170.]

TRESPASS. Upon demurrer the case was, The one sells land, and afterwards the vendee, by reason thereof, claims a way over part of the plaintiff's land, there being no other convenient way adjoining: and, Whether this were a lawful claim? was the question.

And it was resolved without argument, that the way remained, and that he might well justify the using thereof, because it is a thing of necessity; for otherwise he could not have any profit of his land: *et e converso*, if a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet he shall have it, as reserved unto him by the law; and there is not any extinguishment of a way by having both lands. Wherefore it was adjudged accordingly for the defendant.¹

¹ See *Horton v. Frearson*, 8 T. R. 50 (1798); 1 Wms. Saund. 323, note 6.

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PACKER v. WELSTED.

UPPER BENCH. 1658.

[Reported 2 Sid. 89, 111.]

SPECIAL verdict. There are three parcels of land, and the necessary and private way is out of the first parcel to the second, and out of the first two parcels to the third parcel. J. S. purchases all these parcels, and then aliens the first two of these parcels to J. N., and the question was, if he shall have a way over the first two parcels to his third parcel. The jurors also found that the alienation was by feoffment, and that there was no other way to come to the land not aliened but by the other land.

Powes, for the plaintiff.

Windham, for the defendant.

GLYN, C. J. If one has a highway on his land and makes a feoffment of the land, yet can he, as subject of the King, use the way. But our case is of the private way, which, as the case is, cannot be called a way properly, because it was to be taken on his own land. But the jurors having found it to be of necessity, it seems to me that the way remains, for it is not only a private inconvenience, but it is also to the prejudice of the public weal, that land should lie fresh and unoccupied; and so has been the opinion of the Lord Rolles, as I hear on the circuit at Winchester.

And the defendant can take a convenient way without the leave of the plaintiff and the law can then adjudge if it is convenient and sufficient [*vel plus ou nemy*] and by all the court judgment was given for the defendant that the unity had not destroyed the way, but that the way continues.

PALMER v. FLETCHER.

KING'S BENCH. 1663.

[Reported 1 Lev. 122.]

CASE was brought for stopping of his lights. The case was, A man erected a house on his own lands, and after sells the house to one, and the lands adjoining to another, who by putting piles of timber on the land, obstructed the lights of the house: And 't was resolved, That although it be a new messuage, yet no person who claims the land by purchase under the builder, can obstruct the lights any more than the builder himself could, who cannot derogate from his own grant, by TWYSDEN and WINDHAM, Justices, HYDE being absent, and KELYNGE doubting. For the lights are a necessary and essential part of the house. And KELYNGE said, Suppose the land had been sold first, and

the house after, the vendee of the land might stop the lights. **TWYSDEN** to the contrary said, Whether the land be sold first or afterward, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees; and cited a case to be so adjudged; but all agreed, that a stranger having lands adjoining to a messuage newly erected, may stop the lights; for the building of any man on his lands, cannot hinder his neighbor from doing what he will with his own lands; otherwise if the messuage be ancient, so that he has gained a right in the lights by prescription. And afterwards in Mich. 16 Car. 2, B. R. a like judgment was given between the same parties, for erecting a building on another part of the lands purchased, whereby the lights of another new messuage were obstructed.¹

3^a PINNINGTON v. GALLAND.

EXCHEQUER. 1853.

[Reported 9 Ex. 1.]

MARTIN, B.² This is a special case, which was argued before us during the last term; and the question is, whether the plaintiff, as occupier of two closes called the Rye Holme closes, is entitled to a right of way over certain lands of the defendant.

The material circumstances are these: In the year 1839 a property consisting of five closes belonged to a Mr. Dickinson. Two of them were the Rye Holme closes, and they were separated by two of the others from the only available highway, the Town-street of Sutton-upon-Trent. From the year 1828 the road over which the plaintiff now claims the right of way was that which was used by Mr. Dickinson's tenant for the occupation of the Rye Holme closes. From a plan, which forms part of the case, the road appears to be the shortest and most direct access from the highway to the closes; and it having been used for so many years by the tenant who occupied the entire property, we think we may safely conclude that it was, and is, the most convenient road.

In 1839 the property was sold by Mr. Dickinson in three lots. A Mr. Moss purchased the Rye Holme closes, a Mr. Newbould purchased one of the other closes, and a Mr. Dearle purchased the remainder of the property, which includes that now belonging to the defendant, and over which the way in question goes. The deeds of conveyance to the three purchasers, although bearing different dates, were all executed

¹ s. c. sub nom. *Palmer v. Fleashees*, 1 Sid. 167. See *Compton v. Richards*, 1 Price, 27 (1814); *Rigby v. Bennett*, 21 Ch. D. 550 (1863); *Birmingham, &c. Banking Co. v. Ross*, 38 Ch. D. 295 (1883).

² Only the opinion is here given.

on the same day, the 8th of April, 1840, and it cannot now be ascertained in what order of priority they were executed. No special grant or reservation of any particular way is contained in any of them; but in the conveyance to Mr. Moss, whose tenant the plaintiff is, there is comprised the usual words, "together with (*inter alia*) all ways, roads, paths, passages, rights, easements, advantages, and appurtenances whatsoever to the said closes belonging, or in any way appertaining." Mr. Dearle executed the deed of conveyance to him.

For several years after the execution of the conveyances, the occupier of the Rye Holme closes continued to use the road in question; but in 1848 the defendant, who had purchased from Mr. Dearle part of the land conveyed thus by Mr. Dickinson, and over which the way in question goes, disputed the plaintiff's right to use it. Attempts were made for arrangement, which failed, and we are now required to decide the point; and we are of opinion that the plaintiff, as occupier of the Rye Holme closes, is entitled to the right of way claimed.

It is impossible to ascertain the priority of the execution of the two conveyances (that to the third purchaser may be put out of consideration), and the plaintiff, having to establish his right, is bound to show that, whichever was the first executed, he nevertheless is entitled to the right of way.

First, assume that the conveyance to Mr. Moss was executed before that to Mr. Dearle. In this case there would clearly be the right of way. It is the very case put by Mr. Serjt. Williams in his note to *Pomfret v. Ricroft*, 1 Wms. Saund. 323, viz., "where a man having a close surrounded with his land, grants the close to another in fee, for life, or for years, the grantee shall have a way over the grantor's land, as incident to the grant, for without it he cannot have any benefit from the grant," and the way would be the most direct and convenient, which we think we may properly assume the one in question in the present case to be. This is founded upon the legal maxim, "*Quando aliquis aliquid concedit, concedere videtur et id sine quo res concessa uti non potest*," which, though it be clearly bad Latin, is, we think, good law.

Secondly, assume that the conveyance to Mr. Dearle was executed the first. In this case the Rye Holme closes were for a short period of time the property of Mr. Dickinson, after the property in the land conveyed to Mr. Dearle had passed out of him. There is no doubt, apparently, a greater difficulty in holding the right of way to exist in this case than in the other; but according to the same very great authority, the law is the same, for the note proceeds thus: "So it is when he grants the land and reserves the close to himself;" and he cites several authorities which fully bear him out: *Clark v. Cogge*, Cro. Jac. 170; *Staple v. Heydon*, 6 Mod. 1; *Chichester v. Lethbridge*, Willes, 72, note. It no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in

Dutton v. Taylor, 2 Lutw. 1487, that it was for the public good, as otherwise the close surrounded would not be capable of cultivation.

According to this law, therefore, the right of way would accrue to Mr. Dickinson upon the execution of the conveyance to Mr. Dearle, and it would clearly pass to Mr. Moss under his conveyance, for it would be a way appurtenant to the Rye Holme closes, and would pass under the words "*all ways to the closes belonging or appertaining*," and, indeed, probably without them. The plaintiff has vested in him, as Mr. Moss's tenant, all his rights of way; and, for the above reason, we think that he is entitled to the judgment of the court.

There is a statement in the case respecting another road described in the plan as from C to D, which the defendant contends was the plaintiff's proper way. But it is perfectly clear, that, whatever may be the rights of the occupiers or owners of the two closes further to the east, called Maples and Catliffe closes, and which were sold and conveyed by Mr. Dickinson before the sales to Mr. Moss and Mr. Dearle, Mr. Moss or the plaintiff his tenant, upon the statement in the present case, has no right to the use of it; and, except by one or other of the roads, the case states that the plaintiff could not get to the Rye Holme closes without being a trespasser upon land other than Mr. Dickinson's.

Judgment for the plaintiff.

Hayes, argued for the plaintiff.

Hugh Hill, for the defendant.¹

RICHARDS v. ROSE.

EXCHEQUER. 1853.

[Reported 9 Ex. 218.]

THE first count of the declaration stated, that the plaintiff was the owner of a certain messuage and dwelling-house, and was entitled to have the same supported by certain land and premises of the defendant adjoining thereto; yet that the defendant wrongfully and unlawfully dug, excavated, and made a drain-hole and tunnel, and removed and

¹ See *Davies v. Sear*, L. R. 7 Eq. 427 (1860).

As to the location of a way of necessity, see *Packer v. Welsted*, ante; *Pearson v. Spencer*, 3 B. & S. 761 (1868); *Bolton v. Bolton*, 11 Ch. D. 968 (1879); *Ritchey v. Weisk*, 149 Ind. 214 (1897); *Fritz v. Tompkins*, 168 N. Y. 524, 583 (1901).

That a way of necessity does not arise when the land is acquired by escheat, see *Proctor v. Hodgson*, 10 Ex. 824 (1855); nor when it is taken by condemnation proceedings, see *Banks v. School Directors*, 194 Ill. 247 (1902). On the creation or reservation of a way of necessity when land is taken on execution, see *Pernam v. Wead*, 2 Mass. 208 (1806); *Russell v. Jackson*, 2 Pick. 574 (Mass., 1824); *Schmidt v. Quinn*, 186 Mass. 575 (1884). Cf. *Kieffer v. Imhoff*, 26 Pa. 488 (1856).

A grantor is not debarred from having a way of necessity because his deed has a covenant for warranty. *Brigham v. Smith*, 4 Gray, 297 (Mass., 1855); *N. Y. & N. E. R. Co. v. Railroad Commissioners*, 162 Mass. 81 (1894); *Jay v. Michael*, 92 Md. 198 (1900).

took away part of the said land of the defendant, and thereby deprived the said messuage and dwelling-house of the plaintiff of the said support to which she was lawfully entitled, whereby the walls, and parts of the said house cracked, gave way, and were damaged.

The second count charged the defendant with having negligently, &c., dug the drain, whereby the walls of the said dwelling-house were undermined, cracked, and damaged.

The defendant pleaded, first, Not guilty to the whole declaration; and secondly, to the first count, that the plaintiff was not entitled to have her said messuage or dwelling-house supported by the said land and premises of the defendant adjoining thereto. Upon which pleas issues were joined.

At the trial, before *Pollock*, C. B., at the Middlesex Sittings after last term, it appeared that the plaintiff's and defendant's houses adjoined each other, being numbers five and six in the same street; and that the action was brought to recover compensation for damage done to the plaintiff's house by the disturbance of its foundations. The houses had been originally the property of the same person; and in August, 1847, he demised them both to one Watmough, by separate instruments, for ninety-nine years. Watmough mortgaged them to one Brown, and he assigned his interest in the mortgage to one Halliday, who, under a power contained in the deed of mortgage, sold one of the houses to the plaintiff in July, 1849, and the other house to the defendant in the following month of September. At the time the houses were built, there was no public sewer, but the ground landlord, under the supervision of the Commissioners of Sewers, made a sewer through the public street for the convenience of the tenants; and the defendant, by the consent of the Commissioners, formed a drain in connection with the public sewer through his own house. In making this drain, the damage was occasioned for which the present action was brought.

On the part of the defendant, it was objected that, under this state of circumstances, the action could not be maintained, inasmuch as the plaintiff had not established her right to the support she claimed. The Lord Chief Baron left the case to the jury, who found a verdict for the plaintiff with £25 damages, leave being reserved to the defendant to move to set that verdict aside, and to enter a verdict for him.

Lush moved accordingly.

The court then intimated that the learned counsel might take a rule *nisi* upon the latter point, on payment of costs; but this he declined to do.

Cur. adv. vult.

POLLOCK, C. B., now said — In this case Mr. Lush moved for a rule *nisi* to set aside the verdict found for the plaintiff with £25 damages, and to enter a verdict for the defendant. We are all of opinion that there ought to be no rule. It seems to be clear that, where a number of houses are built upon a plot of ground, all the houses belonging to the same person, being all built together, and each obviously requiring

the mutual support of its neighbors for their common protection and security, such right of mutual support equally exists, whether the owner parts first with one house, and then with another, or with two together, the ownership of the latter being afterwards divided, either by sale, mortgage, devise, or by any other means. The right does not depend upon the determination of the fact whether the houses are parted with at one or at separate times. That fact cannot affect the result where the houses are originally built, depending upon each other, and requiring their mutual support. It seems to be purely a matter of common sense, that the possessors are not to be deprived of that mutual support, and that a person in possession of one of the houses shall not be permitted to say to his neighbors, "You are not entitled to the protection of my house: I will pull it down to the ground, and will let the houses upon each side of it collapse and fall into the ruins." The case of *Pinnington v. Galland*, 9 Ex. 1, which is a recent decision of this court, seems to involve the same principle. That, however, was in respect of a right of way, and not of a right of support. But we are all of opinion that, where houses have been erected in common by the same owner upon a plot of ground, and therefore necessarily requiring mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support; so that the owner who sells one of the houses, as against himself grants such right, and on his own part also reserves the right; and consequently the same mutual dependence of one house upon its neighbors still remains. Upon the point reserved, therefore, there will be no rule. The learned counsel seems also to have objected, that the finding of the jury must have been based upon something in the nature of a compromise, inasmuch as the damages, if any, should have been much greater in amount, and consequently that the verdict requires revision. It appears, however, to us that although there are cases in which such an argument might prevail, the present case does not fall within such principle. In the case of an action on a bill of exchange, to which the defendant pleads only that the bill is forged, and the jury find a verdict for the plaintiff, with damages one farthing, thereby compromising the matter by finding that the bill is not forged, and yet giving the plaintiff nominal damages only, the court would clearly see that the verdict is inconsistent, and that the jury had failed to discharge their duty. That principle does not apply where the damages are large. And, moreover, in this case there was evidence to show that the foundation of the plaintiff's house was not very secure, and consequently there was some color for the view which the jury took of the amount of damage occasioned by the defendant's act. The court are of opinion that the defendant is not entitled to a rule for a new trial upon this point, except upon payment of costs; and the learned counsel has declined to accept the rule upon that condition.

*Rule refused.*¹

¹ See *Pearson v. Spencer* (case under a will), 3 B. & S. 761 (1863); *Morrison v. King* (also under a will), 62 Ill. 30 (1871); *Rogers v. Sinsheimer*, 50 N. Y. 646 (1873); *Adams v. Marshall*, 138 Mass. 228 (1885).

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PYER v. CARTER.

EXCHEQUER. 1857.

[Reported 1 H. & N. 916.]

THE declaration stated, that before and at the time of committing the grievances, &c., the plaintiff was lawfully possessed of a messuage and premises with the appurtenances, situate in St. Anne Street, Liverpool, and by reason thereof was entitled to a drain or sewer, and passage for water, leading from the said messuage and premises, in, through, and under certain adjoining land at Liverpool aforesaid, through which the rain and water from the plaintiff's said messuage and premises of right had flowed, and still of right ought to flow, away from the plaintiff's said messuage and premises: yet the defendant wrongfully stopped up the said drain and sewer, whereby divers large quantities of rain and water which of right ought to have flowed, and otherwise would have flowed, through the same drain, sewer and passage for water, were prevented from flowing from the plaintiff's said messuage and premises, and flooded, soaked into and injured the same, &c.

Pleas.—First: Not guilty. Secondly: that the plaintiff was not entitled to the said drain, sewer, and passage for water; nor did the rain and water from the plaintiff's said messuage and premises of right flow, nor ought to flow, away from the plaintiff's said messuage and premises through the said drain, sewer and passage for water as alleged.—Issues thereon.

At the trial, before *Bramwell*, B., at the last Lancashire Summer Assizes, it appeared that the plaintiff and defendant were owners of adjoining houses situate in St. Anne Street, Liverpool. These houses had been formerly one house, and had belonged to a person of the name of Williams, who converted them into two houses. In July, 1853, Williams conveyed the defendant's house to him in fee. This conveyance contained no reservation of any easement. In September, 1853, Williams conveyed the plaintiff's house to him in fee. At the time of these conveyances a drain or sewer ran under the plaintiff's house and thence under the defendant's house and discharged itself into the common sewer in St. Anne Street. Water from the eaves of the defendant's house fell on the plaintiff's house, and from thence flowed down a spout into the drain on the plaintiff's premises, and so into the common sewer. The defendant blocked up the drain where it entered his house, and in consequence, whenever it rained, the plaintiff's house was flooded. The defendant stated that he was not aware of the drain at the time of the conveyance to him. It was proved that the plaintiff might construct a drain directly from his own house into the common sewer at a cost of about six pounds.

It was submitted on the part of the defendant, that the plaintiff had no right to the use of the drain under the defendant's house. The learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

Hugh Hill, in the following term, obtained a rule *nisi* accordingly.

Edward James (with whom was *Raffles*) showed cause.

Hugh Hill and *Mellish*, contra.

Cur. adv. vult.

The judgment of the court was now delivered by

WATSON, B. This was an action for stopping a drain that ran under both the plaintiff's and defendant's houses, taking the water from both. The cause was tried at Liverpool, before Baron *Bramwell*, when a verdict was entered for the plaintiff, and a motion was made to enter a verdict for defendant in pursuance of leave reserved at the trial.

The plaintiff's and defendant's houses adjoined each other. They had formerly been one house, and were converted into two houses by the owner of the whole property. Subsequently the defendant's house was conveyed to him, and after that conveyance the plaintiff took a conveyance of *his* house. At the time of the respective conveyances the drain ran under the plaintiff's house and then under the defendant's house, and discharged itself into the common sewer. Water from the eaves of the *defendant's* house fell on the *plaintiff's* house, and then ran into the drain on plaintiff's premises, and thence through the drain into the common sewer. The plaintiff's house was drained through this drain. It was proved that, by the expenditure of six pounds, the plaintiff might stop the drain and drain directly from his own land into the common sewer. It was not proved that the defendant, at the time of his purchase, knew of the position of the drains.

Under these circumstances we are of opinion, upon reason and upon authority, that the *plaintiff* is entitled to our judgment. We think that the owners of the plaintiff's house are, by implied grant, entitled to have the use of this drain for the purpose of conveying the water from his house, as it was used at the time of the defendant's purchase. It seems in accordance with reason, that where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his house, and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house *such as it is*. If that were not so, the inconveniences and nuisances in towns would be very great. Where the owner of several adjoining houses conveyed them separately, it would enable the vendee of any one house to stop up the system of drainage made for the benefit and necessary occupation of the whole. The authorities are strong on this subject. In *Nicholas v. Chamberlaine*, Cro. Jac. 121, it was held by all the court

that, "if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to his house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house, *because it is necessary and quasi appendant thereto*, and he shall have liberty by law to dig in the land for amending the pipes or making them new as the case requires. So if a lessee for years of a house and land erect a conduit upon the land, and after the term *the lessor occupies them together for a time*, and afterwards sells the house with the appurtenances, to one, and the land to another, the vendee shall have the conduit and the pipes, and liberty to amend them." *Shury v. Pigott*, Popham, 166; s. c. 3 Bulst. 339; and the case of *Coppy v. I. de B.*, 11 Hen. 7, 25, pl. 6, support this view of the case, that where a gutter exists at the time of the unity of seisin of adjoining houses it remains when they are aliened by separate conveyances, as an easement of necessity.

It was contended, on the part of the defendant, that this pipe was not of necessity, as the plaintiff might have obtained another outlet for the drainage of his house at the expense of six pounds. We think that the amount to be expended in the alteration of the drainage, or in the constructing a new system of drainage, is not to be taken into consideration, for the meaning of the word "necessity" in the cases above cited, and in *Pinnington v. Galland*, 9 Exch. 1, is to be understood the necessity at the time of the conveyance, and as matters then stood without alteration; and whether or not at the time of the conveyance there was any other outlet for the drainage water, and matters as they then stood, must be looked at for the necessity of the drainage.

It was urged that there could be no implied agreement unless the easement was apparent and continuous. The defendant stated he was not aware of this drain at the time of the conveyance to him; but it is clear that he must have known or ought to have known that some drainage then existed, and if he had inquired he would have known of this drain; therefore it cannot be said that such a drain could not have been supposed to have existed; and we agree with the observation of Mr. Gale (*Gale on Easements*, p. 53, 2d ed.) that by "*apparent signs*" must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. We think that it was the defendant's own fault that he did not ascertain what easements the owner of the adjoining house exercised at the time of his purchase; and therefore we think the rule must be discharged.

Rule discharged.

SUFFIELD v. BROWN.

CHANCERY. 1863.

[*Reported 4 De G. J. & S. 185.*]

THIS was an appeal by the defendant from a decree of the Master of the Rolls, whereby his Honor granted without costs a perpetual injunction restraining the appellant from preventing or interfering with the full use and enjoyment of the dock, hereinafter referred to, by the plaintiffs in the manner the same had theretofore been used, by allowing the bowsprit of any vessel in the plaintiffs' dock to overlie or overhang a certain specified portion, to be marked out by metes and bounds, of the appellant's wharf, also hereinafter referred to, with liberty to apply.

The plaintiffs were respectively the owners in fee and lessees of a dock situate on the Thames at Bermondsey, and used for repairing ships, principally sailing vessels.

The appellant was the owner in fee of a strip of land and coal wharf adjoining the dock, on which he had begun to build a warehouse.

The plaintiffs filed the bill in this suit for an injunction to restrain such building, on the ground that when their dock was occupied by a vessel of large size, her bowsprit must project over the boundary fence of the dock, across the appellant's premises, which it could not do if the appellant's building should be erected, and that they had a right to restrain such building, because it would deprive them of an easement or privilege which they were entitled to use or exercise over the land of the appellant.

The plaintiffs put their case upon possession and enjoyment of the privilege claimed by them of sufficient duration to create a legal title. The Master of the Rolls decided, and in the judgment of the Lord Chancellor (from whose judgment the present statement of the facts is in the main taken) correctly, that the plaintiffs had not proved a possession or enjoyment sufficient to create a legal title to an easement; but his Honor nevertheless granted an injunction in the terms above stated.

Shortly stated, the facts of the case were as follows:—

From the year 1841 until the month of June, 1845, a person named Knox was the owner in fee, and also the occupier, both of the dock and of the adjoining strip of land and coal wharf; and the evidence proved that during such period whenever a ship of any size was taken into the dock to be repaired, her standing bowsprit projected over and across the adjoining strip of land.

In the month of June, 1845, the two properties, the dock and the strip of land and coal wharf, were put up for sale by Knox by public auction.

In the description given in the particulars of sale, it was stated

that the dock was capable of holding two vessels of large size, and that at low water several vessels, or a steamer of the largest class, could safely lie on "the ways" for repairs.

The strip of land described and sold as a "freehold coal wharf" was stated to be capable of being rendered worth a very large rental by a comparatively small outlay. It was represented, therefore, as an improvable property, and nothing was stated to show that the dock or its owners either then had, or were intended to have, any right or privilege over the adjoining premises.

At the auction, the strip of land and coal wharf were sold to one Gibson, and by the conveyance, which was dated in July, 1845, the vendor (who, at the execution of the deeds, still remained owner of the dock), conveyed the strip of land and coal wharf to the purchaser, under whom the appellant claimed, in the most unqualified manner in fee simple, "together with all privileges, easements and appurtenances to the premises belonging, and all the estate, right, title, interest, property, claim and demand whatsoever, both at law and in equity, of the vendor, in, to, or out of the same hereditaments and premises, and every part thereof." The dock was afterwards sold and conveyed to other persons, under whom the plaintiffs claimed.

Mr. Selwyn and *Mr. Druce* appeared for the plaintiffs in support of the decree of the Master of the Rolls.

Mr. Baggallay, *Mr. Mellish*, and *Mr. Wickens* for the appellant.

At the conclusion of the arguments, the Lord Chancellor reserved his judgment.

THE LORD CHANCELLOR [LORD WESTBURY], after stating the nature and the facts of the case to the effect of the statement hereinbefore contained, proceeded as follows:—

The conveyance of the coal wharf, therefore, is the grant of a person who was at that time absolute owner of the dock, in respect of the ownership of which the present right is now claimed by his grantees against the coal wharf, and it is very difficult to understand how any interest, right or claim in, over or upon any part of the coal wharf could remain in the grantor, or be granted by him to a third person, consistently with the prior, absolute and unqualified grant that was so made of the coal wharf premises to the purchaser.

Assuming that the vendor had been in the habit, during his joint occupation of both properties, of making the coal wharf subservient in any way to the purposes of the dock, one would suppose that the right to do so was cut off and released by the necessary operation of an unqualified sale and conveyance of the subservient property.

It seems to me more reasonable and just to hold that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties), by the fiction of an implied reservation. If this plain rule be adhered to, men will know

what they have to trust, and will place confidence in the language of their contracts and assurances.

But this view of the case is not that taken by his Honor the Master of the Rolls.

In the note which has been furnished me of his Honor's judgment, his Honor is represented as saying:—"The ground on which I think he (the defendant) cannot contest this right in the plaintiff is because I think that such projection of the bowsprit from the vessel in the dock is essential to the full and complete enjoyment of the dock as it stood at the time when he, or rather Gibson under whom he claims, purchased the wharf, and that Gibson and he had distinct notice of this fact, not merely from the description contained in the particulars of sale under which he bought, but also because the fact was patent and obvious to any one, on the ground that if the dock admitted the largest vessel capable of being contained in it, the bowsprit must project over that portion of the wharf which I have pointed out." And again, "If, therefore, it be true that the dock can still be used, it is equally true that it cannot be used exactly as it has been heretofore, and my opinion is that this projection of the bowsprit is necessary for the due enjoyment of the dock in the ordinary sense of that term."

The effect of this is, that if I purchase from the owner of two adjoining freehold tenements the fee simple of one of those tenements and have it conveyed to me in the most ample and unqualified form, I am bound to take notice of the manner in which the adjoining tenement is used or enjoyed by my vendor, and to permit all such constant or occasional invasions of the property conveyed as may be requisite for the enjoyment of the remaining tenement in as full and ample a manner as it was used and enjoyed by the vendor at the time of such sale and conveyance. This is a very serious and alarming doctrine; I believe it to be of very recent introduction; and it is in my judgment unsupported by any reason or principle, when applied to grants for valuable consideration.

That the purchaser had notice of the manner in which the tenement sold to him was used by his vendor for the convenience of the adjoining tenement is wholly immaterial, if he buys the fee simple of his tenement, and has it conveyed to him without any reservation. To limit the vendor's contract and deed of conveyance by the vendor's previous mode of using the property sold and conveyed is inconsistent with the first principles of law, as to the effect of sales and conveyances.

Suppose the owner of a manufactory to be also the owner of a strip of land adjoining it on which he has been for years in the habit of throwing out the cinders, dust and refuse of his workshops which would be an easement necessary (in the sense in which that word is used by the Master of the Rolls) for the full enjoyment of the manufactory; and suppose that I, being desirous of extending my garden, purchase this piece of land and have it conveyed to me in fee simple; and the owner

of the manufactory afterwards sells the manufactory to another person ; am I to hold my piece of land subject to the right of the grantee of the manufactory to throw out rubbish on it? According to the doctrine of the judgment before me, I certainly am so subject ; for the case falls strictly within the rules laid down by his Honor, and it reduces them to an absurd conclusion.

The first introduction of this extraordinary doctrine appears to have been made in the following manner : —

A learned and ingenious author, the late Mr. Gale, published, in the year 1839, a work of great merit on this subject of easements, in which he derived from the doctrine of the French Code Civil certain rules with which he conceived that the law of England agreed, and inasmuch as these conclusions have been cited with approbation in some recent cases at common law, and as they form the principal support of the plaintiff's argument, it is right to state and examine them.

Mr. Gale, in the opening of his 4th chapter (page 81, ed. 3), says : "The implication of the grant of an easement may arise in two ways : 1st, upon the severance of an heritage by its owner into two or more parts ; and, 2dly, by prescription. Upon the severance of an heritage a grant will be implied, 1st, of all those continuous and apparent easements which have in fact been used by the owner during the unity, and which are necessary for the use of the tenement conveyed, though they have had no legal existence as easements ; and, 2dly, of all those easements without which the enjoyment of the severed portions could not be had at all."

It will be observed that the learned author is not here speaking of easements which are already legally existing before the unity of possession, but of those which he supposes to arise for the first time by implication from the grant.

If nothing more be intended by this passage than to state, that on the grant by the owner of an entire heritage of part of that heritage, as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements which have been and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted, there can be little doubt of its correctness ; but it seems clear that the learned writer uses the word "grant" in the sense of reservation or mutual grant, and intends to state, that where the owner of the entirety sells and grants a part of it in the fullest manner, there will still be reserved to such owner all such continuous and apparent or necessary easements out of or upon the thing granted as have been used by the owner for the benefit of the unsold part of the heritage during the unity of possession. This is clearly shown by what is subsequently laid down, that it is immaterial which of the two tenements is first granted, whether it be the *quasi dominant* or *quasi servient* tenement.

But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements

enjoyed by an adjoining tenement which remains the property of him the grantor.

Consider the easements as if they were rights, members or appurtenances of the adjoining tenement; they still admit of being aliened or released, and the absolute sale and grant of the land on or over which they are claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted which is separable from the tenement retained, and can be aliened or released by the owner.

Many rules of law are derived from fictions, and the rules of the French Code, which Mr. Gale has copied, are derived from the fiction of the owner of the entire heritage, which is afterwards severed, standing in the relation of *père de famille*, and impressing upon the different portions of his estate mutual services and obligations which accompany such portions when divided among them, or even, as it is used in French law, when aliened to strangers.

But this comparison of the disposition of the owner of two tenements to the *destination du père de famille* is a mere fanciful analogy, from which rules of law ought not to be derived. And the analogy, if it be worth grave attention, fails in the case to be decided, for when the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end, by contract, to the relation which he had himself created between the tenement sold and the adjoining tenement; and discharges the tenement so sold from any burden imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation and not by the previous user of the vendor during such joint ownership.

And this observation leads me to notice the fallacy in the judgment of the Court of Exchequer in the case of *Pyer v. Carter*, 1 H. & N. 916, one of the two cases on which the Master of the Rolls relies.

In *Pyer v. Carter* the owner of two houses sold and conveyed one of them to a purchaser absolutely, and without reservation, and he subsequently sold and conveyed the remaining house to another person. It appeared that the second house was drained by a drain that ran under the foundation of the house first sold; and it was held that the second purchaser was entitled to the ownership of the drain, that is, to a right over the freehold of the first purchaser, because, said the learned judges, the first purchaser takes the house "such as it is." But with great respect, the expression is erroneous, and shows the mistaken view of the matter; for in a question, as this was, between the purchaser and the subsequent grantee of his vendor, the purchaser takes the house not "such as it is," but such as it is described and sold and conveyed to him in and by his deed of conveyance; and the terms of the conveyance in *Pyer v. Carter* were quite inconsistent with the notion of any right or interest remaining in the vendor. It was said by the court that the easement was "apparent," because the purchaser might have found it out by inquiry; but the previous question is whether he was under any obligation to make inquiry, or would be affected by the result of it;

which, having regard to his contract and conveyance, he certainly was not. Under the circumstances of the case of *Pyer v. Carter* the true conclusion was, that as between the purchaser and the vendor the former had a right to stop and block up the drain where it entered his premises, and that he had the same right against the vendor's grantee. I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority.

But to the earlier cases cited by the court in *Pyer v. Carter* as authorities for its decision there can be no objection.

In *Nicholas v. Chamberlain*, Cro. Jac. 121, it was decided that if the owner of a house, being also owner of the land surrounding it, make a conduit through part of the land to the house, and then sells the house with its appurtenances, the right to the conduit passes; that is to say, the court held that the conduit was a thing appertaining to the house, and as such passed under the conveyance; and in the same case it was also decided, that if the owner sell the land, reserving the house, the right to the conduit is reserved, — a decision which merely amounts to this, that the reservation, like the grant of a house, is the reservation or grant of it with its appurtenances.

To this case and to the case in the Year Book of the 11th of Henry VII., 25 Pl. 6, *Coppy v. J. de B.*, or the case of *Sury v. Pigott*, Palmer, 444, there can be no objection; but they do not give any support to the decision in *Pyer v. Carter*.

The other case relied on by his Honor, namely, *Hinchcliffe v. The Earl of Kinnoul*, 5 Bing. N. C. 1, is of a different character, and does not apply to the question of easements reserved by implication or the grant of the *quasi servient* tenement. In that case, there being two adjoining houses, belonging to the same lessor, it appeared that the coal cellar under one house was supplied through a shoot, the mouth of which opened in the yard of the adjoining house; and it was held that a demise by the owner of both houses, of the first house with its appurtenances, carried with it the right to use the coal shoot, and also a right of way to the coal shoot through the premises of the adjoining house, such way being necessary for the enjoyment of the coal shoot, — a decision which rests upon the ordinary principle of law, that if I grant a tenement for valuable consideration I also grant a right of way to it through my land, if such way be absolutely necessary for the enjoyment of the thing granted.

This case might have had some application to the present if the dock had been the property first sold, and had been conveyed with all privileges, easements, rights, and appurtenances as then used and enjoyed by the vendor, he being still the owner of the adjoining strip of land and coal wharf; but it is plain that no easements can arise by the necessary operation of a grant, unless it be in the power of the grantor to give such easements.

It is true that there may be two tenements, as, for example, two adjoining houses, so constructed as to be mutually subservient to and

dependent on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbor; in which case the alienation of one house by the owner of both would not estop him from claiming, in respect of the house he retains, that support from the house sold, which is at the same time afforded in return by the former to the latter tenement (which was the case of *Richards v. Rose*, 9 Exch. 218); but where the right claimed in respect of the tenement retained by the joint owner against the tenement granted by him is separable from the former tenement, it is severed, and either passed or extinguished by the grant.

It must be always recollected that I have been speaking throughout of cases where (as in the present case) the easement claimed had no legal existence anterior to the unity of possession, but is claimed as arising by implied grant or reservation upon the disposition of one of two adjoining tenements by the owner of both, — which is in my opinion an ingenious but fanciful theory, which is, as to part, not required by, and is as to the other part wholly inconsistent with, the plain and simple principles of English law that regulate the effect and operation of grants of real property.

There is in my judgment no possible legal ground for holding that the owner of the dock retained or had in respect of that tenement any right or easement over the adjoining tenement of the strip of land and coal wharf after the sale and alienation of the latter in the year 1845. I must entirely dissent from the doctrine on which his Honor's decree is founded, that the purchaser and grantee of the coal wharf must have known, at the time of his purchase, that the use of the dock would require that the bowsprits of large vessels received in it should project over the land he bought, and that he must be considered, therefore, to have bought with notice of this necessary use of the dock, and that the absolute sale and conveyance to him must be cut down and reduced accordingly. I feel bound, with great respect, to say that in my judgment such is not the law.

But if any part of this theory were consistent with law, it would not support the decree appealed from, for the easement claimed by the plaintiff is not "continuous," for that means something the use of which is constant and uninterrupted; neither is it "an apparent easement," for except when a ship is actually in the dock with her bowsprit projecting beyond its limits, there is no sign of its existence; neither is it a "necessary easement," for that means something without which (in the language of the treatise cited) the enjoyment of the dock could not be had at all.

But this is irrelevant to my decision, which is founded on the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made.

Therefore I must reverse the decree of the Master of the Rolls, and dissolve the injunction he has granted, and dismiss the plaintiff's bill, with costs.

WATTS v. KELSON.

CHANCERY. 1870.

[*Reported L. R. 6 Ch. 166.*]

THIS was an appeal by the plaintiff from a decree of the Master of the Rolls, so far as it dismissed part of his bill. The suit was brought to maintain an alleged right of way by the plaintiff over the defendant's premises to the plaintiff's premises, and an alleged right to the uninterrupted flow of water along an artificial watercourse through the defendant's premises to the plaintiff's. The Master of the Rolls decided in favor of the plaintiff respecting the right of way, but dismissed so much of the bill as related to the watercourse, and gave neither party the costs of suit.

The plaintiff and the defendant were the owners and occupiers of two adjoining properties, which, up to January, 1863, belonged to a single owner; but on the 10th of January, 1863, John Graham Foley, the then owner of the two properties, conveyed to the plaintiff the premises in respect of which the easements were claimed, which then consisted of a cottage residence and a large number of stalls for feeding cattle, with a yard and outbuildings belonging thereto, and a few acres of land. The premises were conveyed, together with (amongst other general words) "all roads, ways (and particularly a right of way through the gateway of the said J. G. Foley, which opens into [here was described one of the closes of the vendor, which had since become the property of the defendant] to a wicket-gate to be erected by the said C. Watts, leading into the hereinbefore described piece or part of garden ground [part of the premises conveyed], which gate and wicket-gate are shown in the plan by the letters A and B), waters, watercourses, rights, privileges, advantages, and appurtenances whatsoever to the same hereditaments and premises belonging or appertaining, or with the same or any part thereof, held, used, enjoyed, or reputed as part thereof or appurtenant thereto."

On the 11th of June, 1863, Foley conveyed to one Collins the property over which the easements were claimed. The defendant purchased in 1868 from Collins.

A small natural stream flowed from the defendant's premises to the plaintiff's premises, and at the time of the conveyance to the plaintiff there was near to the house purchased by the defendant, and on the ground purchased, a tank which stopped the natural flow of the water, and an artificial drain or culvert into which the water flowed from the tank through a considerable distance to another tank also in the property purchased by the defendant, and from that tank there were two pipes which conducted the water to the yard of the plaintiff's cattle-sheds, where it could be used by the occupier of the plaintiff's premises for any purpose that he required. This artificial watercourse was origi-

nally made for the express purpose of supplying the cattle-sheds with water, and was made by the owner of both properties. According to several of the witnesses it was not originally supplied with water from the upper tank, but from a lower part of the stream. It was admitted, however, that as early as the year 1860 the connection was formed between the upper tank and the drain which conducted the water to the lower tank, and that from that time the lower tank was exclusively supplied with water from the upper tank. Water was thus obtained much more pure than if it was taken from the stream after it had entered the plaintiff's land.

It was alleged by the defendant that the plaintiff having, after he purchased his own property, become in the year 1864 tenant of the property now belonging to the defendant, had altered the upper tank by making a hole in its lower side, and placing an iron hatch over the hole, and that the effect of this was to raise the water in the tank, and to increase the flow of the water through the artificial watercourse. The court, however, came to the conclusion, upon the evidence, that before the iron hatch was placed on the tank there had been a wooden hatch, or some wooden contrivance, which practically served the purpose of raising the water in the tank, so as to cause it to flow freely down the artificial watercourse to the lower tank, and that the plaintiff was not proved to have made any such alteration in the watercourse as could affect any right to the water he might otherwise have.

The cattle-sheds no longer existed on the plaintiff's land, their place being occupied by cottages, and the water being used by the tenants for domestic purposes.

As regards the right of way, the position of the points A and B, which were distant only a few yards from each other, was not in dispute. The gate A was a gate which would admit carriages. The plaintiff, for some time after his purchase, was the tenant of the property subsequently purchased by the defendant. He did not erect a wicket-gate at B, but erected a cart-shed on that part of the piece of garden ground which was nearest to the point B, and used the space between A and B as a way for bringing carts to it. The defendant obstructed this way, alleging that the right granted to the plaintiff by his conveyance was only a right of footway.

The plaintiff filed his bill to establish his right to the use of the water, and to a carriage-way from A to B, and for an injunction to restrain the defendant from interfering with those rights. The Master of the Rolls held that the plaintiff had shown a right to the carriage-way, but dismissed the bill so far as it related to the right of water.

The plaintiff appealed.

Mr. Amphlett, Q. C., and *Mr. T. A. Roberts*, for the appellant.¹

Mr. Southgate, Q. C., and *Mr. W. Barber*, for the defendant.

¹ During the argument the Lord Justice MELLISH said, "I think that the order of the two conveyances in point of date is immaterial, and that *Pyer v. Carter* is good sense and good law. Most of the common law judges have not approved of Lord

The judgment of the court was delivered by

SIR G. MELLISH, L. J., who, after stating the facts as to the watercourse, continued :—

The real question to be determined is: Did the indenture of the 10th of January, 1868, convey to the plaintiff any right to the benefit of the artificial watercourse above described? The Master of the Rolls has held, on the authority of *Thomson v. Waterlow*, 1 L. R. 6 Eq. 36, and *Langley v. Hammond*, L. R. 8 Ex. 161, that, because the artificial watercourse was first made and begun by a person who was owner of both properties, and had no prior existence at a time when the properties were separately owned, the general words in the conveyance were not sufficient to pass the right. *Thomson v. Waterlow* and *Langley v. Hammond* were both cases of rights of way, and we cannot but think that, in the decision of the Master of the Rolls, the well-established distinction between easements, like rights of way, which are only used from time to time, and what are called continuous easements, has been overlooked. In *Polden v. Bastard*, L. R. 1 Q. B. 156, 161, Chief Justice Erle, delivering the unanimous judgment of the Exchequer Chamber, says: "There is a distinction between easements such as a right of way, or easements used from time to time, and easements of necessity, or continuous easements. The cases recognize this distinction, and it is clear law that upon a severance of tenements easements used as of necessity, or in their nature continuous, will pass by implication of law, without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner by appropriate language shows an intention that they should pass."

We are clearly of opinion that the easement in the present case was in its nature continuous. There was an actual construction on the servient tenement extending to the dominant tenement by which water was continuously brought through the servient tenement to the dominant tenement for the use of the occupier of the dominant tenement. According to the rule, as laid down by Chief Justice Erle, the right to such an easement as the one in question would pass by implication of law without any words of grant, and we think that this is the correct rule; but if words of grant are necessary, we also think that the general words in this case are amply sufficient to pass the easement. It was a watercourse with the premises at the time of the conveyance used and enjoyed. We may also observe that, in *Langley v. Hammond*, Baron Bramwell expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words. We do not think it necessary to go through the large number of cases cited in the argument, and it will be sufficient to refer to two or three of them.

Westbury's observations on it"; and the Lord Justice JAMES added, "I also am satisfied with the decision in *Pyer v. Carter*."

In the old case of *Nicholas v. Chamberlain*, Cro. Jac. 121, it was held by all the court, upon demurrer, that if one erects a house, and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduits and pipes pass with the house, because they are necessary and *quasi* appendant thereto. This case has always been cited with approval, and is identical, not only in principle, but in its actual facts, with the case now before us. It was expressly approved of by Lord Westbury in *Suffield v. Brown*, 12 W. R. 356, where, though he objected to the decision in *Pyer v. Carter*, 1 H. & N. 916, in which it was held that a right to an existent continuous apparent easement was impliedly reserved in a conveyance by the owner of two houses of the alleged servient houses, yet he seems to agree that a right to such an easement would pass by implied grant where the dominant tenement is conveyed first.

Wardle v. Brocklehurst, 1 E. & E. 1058, is also a direct authority, that by a grant of a farm with the usual general words the benefit of a culvert and a stream of water running through the lands of the vendor to the farm granted passed; and Lord Campbell says: "The land must be taken to be conveyed in the state in which it then was; that is, we must take it that the culvert so bringing down the water and all the watercourses are granted, not only those which belong and appertain to the premises, but also those which were used and enjoyed therewith." This judgment was affirmed in the Exchequer Chamber, and it was held that the defendant was entitled to use the water not only for the farm which was sold to him, but for a manufactory which he possessed beyond.

It was objected before us, on the part of the defendant, that on the severance of the two tenements no easement will pass by an implied grant, except one which is necessary for the use of the tenement conveyed, and that the easement in question was not necessary. We think that the watercourse was necessary for the use of the tenement conveyed. It was, at the time of the conveyance, the existing mode by which the premises conveyed were supplied with water; and we think it is no answer that, if this supply was cut off, possibly some other supply might have been obtained. We think it is proved on the evidence that no other supply of water equally convenient or equally pure could have been obtained. We are also of opinion, having regard to the general words in the conveyance, that the language of the conveyance was sufficient to pass the right to the watercourse, even if it was not necessary, but only convenient for the use of the premises. It was further objected, that the fact of the plaintiff having pulled down the cattle-sheds and erected cottages in their place, deprived him of the right to the use of water. We are of opinion, however, that what passed to the plaintiff was a right to have the water flow in the accustomed manner through the defendant's premises to his premises, and

that when it arrived at his premises he could do what he liked with it; and that he would not lose his right to the water by any alteration he might make in his premises. On the whole, we are of opinion that the judgment of the Master of the Rolls, on the part of the case relating to the watercourse, ought to be reversed, and that the defendant must be restrained by a perpetual injunction from obstructing and diverting the said stream and watercourse, so as to prevent the same from flowing through the defendant's premises to the plaintiff's in the course and manner in which it used to flow at the time of the execution of the conveyance to the plaintiff of the 10th of January, 1863, or in any way preventing or hindering the plaintiff and the tenants and occupiers of his said hereditaments and premises from having the full use and enjoyment of the said stream, and the water thereof, in the manner in which the same was used and enjoyed before and at the time of the said conveyance. We are also of opinion that the plaintiff should have the general costs of suit in the court below, but that there should be no costs of this appeal.

ESPLEY v. WILKES.

EXCHEQUER. 1872.

[*Reported L. R. 7 Ex. 298.*]

THIS was an action of trespass tried at the last Staffordshire Spring Assizes, before *Byles, J.* The defendant pleaded a private and a public right of way. On the suggestion of the learned judge the plea of a public right of way was withdrawn (the defendant giving no evidence upon it), and a verdict was entered for the defendant upon the plea of a private right of way, leave being reserved to the plaintiff to enter the verdict for him if the court should be of opinion that the lease from Lord Stafford, under which the defendant claimed, did not give him a right of way over the land in question, which land had been since leased by Lord Stafford to the plaintiff.

The facts are fully stated in the judgment of the court.

A rule having been obtained by the plaintiff in pursuance of the leave reserved,

A. S. Hill, Q. C., and Anstie, showed cause.

Matthews, Q. C., and J. O. Griffiths, supported the rule.

Cur. adv. vult.

The judgment of the LORD CHIEF BARON and CLEASBY, B., was delivered by

KELLY, C. B. This was an action of trespass for throwing down a gate. The only pleas we need consider were, 1. a public right of way

new street upon the north, and communicating with it; but the intended new street to the east, which terminates to the south in a drain, is still rough ground, and for the most part impassable as a road.

At the trial of the cause the plea of a public way was given up, and the learned judge directed a verdict for the defendant upon the plea of the private way, but with leave to the plaintiff to move to enter a verdict for himself upon that plea also. And the question is, whether it was the effect of the lease to grant to the lessee a private way along the north front and the east front of the house, now a public-house called the "Sir Robert Peel," and built pursuant to the covenant, at the northeast corner of the land demised, within a year or a little more of the date of the lease. This house, where it abuts upon the northeast, has the sharp corner cut off, and presents the base of a triangle towards the point at which the prolongation of the two sides would meet to the northeast of the house. It has a front door opening into the street to the north, now called Peel Street, and a yard and gate opening into the intended street to the east, where the defendant had been used to receive cart-loads of coal and other articles, until the way round the corner and along the intended street was obstructed by the gate or fence erected by the plaintiff, and to which the trespass for which the action was brought was committed.

The question we have to determine is, whether a private way was granted by the lease of 1851 together with the plan indorsed upon it, and we are of opinion that such was the effect of the lease. The house was built as contemplated by the lease, abutting on each of the two intended new streets; and it is obvious that, unless a grant was expressed or is to be implied in the lease of a way of some kind along both the north front and the east front of the house to be built, it would be impossible for the lessee to bring materials for the building which he had covenanted to erect upon the land, or to go into or out of his house on the north side or the east side whenever it should be built. And as the land was bounded to the west by land leased to Harrod, upon which a house was also to be built, and on the south by land of the lessors from which there was no approach or access to the land leased, the house so covenanted to be erected, now the "Sir Robert Peel," could not be built at all; and if or when built, would be absolutely unapproachable and inaccessible. It must, therefore, have been intended by the parties that there should be either a public way, or a private way, or a way of necessity. Now the claim to a public way was properly given up at the trial, inasmuch as it is clear that no public way existed to the east or to the north of the intended house at the time of the lease; and although it may be inferred from the delineation upon the plan of what were called "new streets" to the east and to the north that it was intended by both lessor and lessee, and indeed expressed in the lease, that there were to be streets then made or afterwards to be made, and though it is possible that a covenant might be implied that new streets should there be made, there is nothing in the

lease to bind the lessor to make them public streets, or to dedicate them to the public; and it was competent to him to make them into private streets for the use only of the lessees of the houses to be built upon the lands demised. The existence of a public way being thus negatived, it was contended by the learned counsel for the plaintiff that all that could be inferred or deduced from the lease and the facts of the case was, that the lessee had acquired a way of necessity. But a way of necessity exists only where the land conveyed or demised is surrounded by other lands of the grantor, and cannot be approached but by a way over the grantor's land where no way exists, and which thus becomes a way of necessity. But here the lessor, by the grant, has expressly described the land demised as abutting upon strips of land of his own to the north and the east, which he himself in the lease describes as newly made streets, and which are distinctly delineated upon the plan, and therein called "new streets." The lessor, therefore, is estopped from denying that there are streets which are in fact ways, which ways run along the north and the east fronts of the houses to be built on the demised lands, including the defendant's house, and of which streets or ways the way claimed in the plea to this action is a part.

We should have thought this point clear upon the obvious and necessary construction of the lease and plan; but the case of *Roberts v. Karr*, 1 Taunt. 495, is a direct authority to that effect. There one Pratt granted a piece of ground to Compigné (under whom the defendant claimed), described as abutting east on a new road. It appeared that between a public road and the abutment in question there was a strip of land, the property of the grantor, but upon which no road existed at the time of the grant. The defendant pleaded a public right of way over this strip of land, and it was held that the grantor and those claiming under him were concluded or estopped from denying that there was a road or way over this piece of land; Mansfield, C. J., observing in the judgment delivered, "If you (the lessor) have told me in your lease this piece of land abuts on the road, you cannot be allowed to say that the land on which it abuts is not a road." And Lawrence, J., observes, "If a man buys a piece of ground described as abutting upon a road, does he not contemplate the right of coming out into the road through any part of the premises?" Here the land is described as abutting upon "newly made streets," and the case is an authority to show that the grantor is estopped from denying that the strips of land, his property, are what he describes them to be, that is to say, "streets," which they cannot be unless there be a way through and along them. *Harding v. Wilson*, 2 B. & C. 96, cited in argument for the plaintiff, is in effect also an authority for the defendant. There a piece of land was granted "abutting upon an intended way 30 ft. wide;" and the land was underlet, the abutment being described as "upon an intended way," but not mentioning the width of thirty feet. It was held that the underlessee was entitled to a convenient way, though not of the width of thirty feet.

But the covenant by the lessee that "he shall and will curb the causeways adjoining the said land with proper curbstone" is conclusive to show that a way was to exist along the north and east fronts of the land demised. The "causeways" are in fact the "newly made streets" mentioned in the lease and delineated on the plan; and a causeway is a way; and the defendant could not curb the causeways without treating them and using them as ways.

Upon these grounds we are of opinion that a way, as pleaded, was granted by the lease; that the plea was proved and properly found for the defendant; and that the rule should be discharged. The defendant has contented himself with a claim to a footway. It may, however, prevent future litigation to observe that it is clear upon the facts before us, that he is equally entitled to a carriage-way over the *locus in quo*.

CHANNELL, B. I have not been free from doubt upon this case, but I do not dissent from the conclusion arrived at by my Lord and my Brother Cleasby.

*Rule discharged.*¹

17 WHEELDON v. BURROWS.

COURT OF APPEAL IN CHANCERY. 1879.

[Reported L. R. 12 CA. D. 81.]

THESIGER, L. J.² The material facts of this case are short and simple. Prior to the month of November, 1875, a person of the name of Samuel Tetley was the owner of certain property in Derby, which included a piece of vacant land having a frontage to the street, and a silk manufactory and certain workshops at the rear of and abutting upon that vacant land, having in one of the workshops certain windows which opened upon that land. Owning this property, Tetley was minded to sell it, and appears to have put it up in several lots for sale by auction; and in respect of some of the lots, including a lot which was afterwards sold to the defendant, the sale by auction was abortive. However, an agreement was made at the auction to sell one of the lots to the plaintiff's husband, and that lot was conveyed to him upon the 6th day of January, 1876, with these general words, "together with all walls, fences, sewers, gutters, drains, ways, passages, lights, water-courses," and the other general words, "easements and appurtenances whatsoever to the said piece of land and hereditaments belonging or in anywise appertaining." The conveyance contains no reservation in express terms of any right to the grantor in respect of his other land. On the 18th of February, a contract was made by which Tetley con-

¹ See *Fox v. Union Sugar Refinery*, 109 Mass. 292 (1872); *Williams v. Boston Water Power Co.*, 184 Mass. 406 (1888); *White v. Tidewater Oil Co.*, 50 N. J. Eq. 1 (1892); *Smith v. Young*, 160 Ill. 168 (1896). Cf. *Howe v. Alger*, 4 All. 206 (Mass. 1862); *Dorman v. Bates Mfg. Co.*, 82 Me. 438 (1890).

² Only the opinion is given.

tracted to sell to the defendant the silk manufactory and the workshop which had the windows opening upon the land previously sold and conveyed to the plaintiff's husband. This action arises from a claim on the part of the defendant to have as of right the light enter into those windows, or, to put it in another way, to prevent the plaintiff from obstructing these windows by building on her land. Upon the matter coming before the Vice-Chancellor, he held that no right in respect of the windows was reserved, either impliedly or expressly, under the conveyance of January, 1876; and, consequently, that the defendant, as privy in estate with the grantor of the land which was the subject of the conveyance, was entitled to no right of light through those windows: in other words, he decided that the plaintiff was entitled to build upon her land, although the result of that building might be to obstruct these lights. I am of opinion, both upon principle and upon authority, that the Vice-Chancellor decided rightly.

We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case.

Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common-sense, viz., that a grantor shall not derogate from his grant. It has been argued before us that there is no distinction between what has been called an implied grant and what is attempted to be established under the name of an implied reservation; and that such a distinction between the implied grant and the implied reservation is a mere modern invention, and one which runs contrary, not only to the general practice upon which land has been bought and sold for a considerable time, but also to authorities which are said to be clear and distinct upon the matter. So far, however, from that distinction being one which was laid down for the first time by and which is to be attributed to Lord Westbury in *Suffield v. Brown*, 4 D. J. & S. 185, it appears to me that it has existed almost as far back as we can trace the

law upon the subject; and I think it right, as the case is one of considerable importance, not merely as regards the parties, but as regards vendors and purchasers of land generally, that I should go with some little particularity into what I may term the leading cases upon the subject.

The first case to which I refer is *Palmer v. Fletcher*, 1 Lev. 122, where the first proposition which I have stated as a general rule was laid down or decided. The other proposition was mooted, but there was a difference of opinion amongst the members of the court upon it, and it was not decided. [His Lordship then read the report.] It appears therefore that upon the proposition that if a man wishes to derogate from his grant or to reserve any right to himself he should state so in the grant itself, there was a difference of opinion in the court, and that point was not decided.

The next case of importance is *Nicholas v. Chamberlain*, Cro. Jac. 121. [His Lordship then read the report, calling attention to the words "necessary *et quasi* appendant thereto."] Now if that determination is held to mean that in all cases this doctrine of implied reservation stands upon exactly the same footing as the doctrine of implied grant, I think it will be found that over and over again that has been over-ruled. But it is clear, as I have already suggested, that to the second rule under which a man is prevented from derogating from his grant there are certain exceptions, one of those being in regard to easements which have been called of necessity; and if *Nicholas v. Chamberlain* only decides that point it appears to me to be quite right. That *Nicholas v. Chamberlain* was not meant to decide more than what I have suggested is, I think, shown by the next case, *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1093. There Lord Holt, in delivering the judgment of the court, deals with that very point which had been mooted in *Palmer v. Fletcher*; and he says, "As to the case of *Palmer v. Fletcher*, if, indeed, the builder of the house sells the house with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and as he cannot do it, so neither can his vendee. But if he had sold the vacant piece of ground, and kept the house without reserving the benefit of the lights, the vendee might build against his house. But in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights." I think it will be found that, putting aside the case of *Pyer v. Carter*, 1 H. & N. 916, there has been no distinct decision which in any way affects the principle laid down in those clear and distinct terms by Lord Holt.

The next case to which I will refer is *Swansborough v. Coventry*, 9 Bing. 805, which has been cited on both branches of the argument addressed to us by Sir Henry Jackson. That was a case of a sale by auction of different lots to different persons at the same time, and it was argued (and I particularly direct attention to this) that such a case must stand upon exactly the same footing as if the land in respect of

which the easement was claimed had been conveyed first; consequently the case would be one in which a grant of the easement would be implied. Now observe what that admits, and the argument so dealt with upon that footing. It admits that priority in time of the conveyance was a material point for consideration, because, if it had not been admitted, then the court might have gone to the general question, not whether the conveyances were at the same time, not whether one preceded the other by a few minutes, or a few days, or by a few years, but whether upon the severance of the property there was this (if I may use the expression) continuous and apparent easement in respect of which a reservation might be claimed, or an implication of a grant might be made. Lord Chief Justice Tindal deals with the matter, as it appears to me, upon the supposition that the general maxim is that a man who conveys property cannot derogate from his grant by reserving to himself impliedly any continuous apparent easements; he says (*Ibid.* 309), "It is well established by the decided cases that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land and sells the house to another person, although the lights be new he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. The principle is laid down by Twysden and Wyndham, JJ., in the case of *Palmer v. Fletcher*, 'that no man shall derogate from his own grant.' The same law was adhered to in the case of *Cox v. Matthews*, 1 Vent. 237, by Chief Justice Holt in *Rosewell v. Pryor*, 6 Mod. 116, and lastly, in the later case of *Compton v. Richards*, 1 Price, 27. And in the present case, the sales to the plaintiff and the defendant being sales by the same vendor and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law." It appears to me, therefore, that this is a decision which fortifies the previous decision of Lord Holt.

I now come to *Pyer v. Carter*, which seems to break the hitherto unbroken current of authority upon this point, and there can be no doubt that Sir Henry Jackson is justified in saying that if that case is right, this appeal ought to be allowed. That was a case of a somewhat special character. A house was conveyed to the defendant by a person who was the owner of that house, and also of the house which was subsequently conveyed to the plaintiff; and there had been during the unity of the ownership the enjoyment of the easement of a spout which extended from the defendant's premises over the plaintiff's premises, and by which water was conveyed on to the latter. But it is material to observe that the water when it came on to what were subsequently the plaintiff's premises was conveyed into a drain on the plaintiff's premises, which drain passed through the defendant's premises, and in that way went out into the common sewer. Subsequently the house over which this easement existed was conveyed to the plaintiff, and upon an obstruction of the drains in the defendant's house,

which, be it observed, immediately caused a flooding of the plaintiff's house by the very water coming from the defendant's house, the plaintiff brought his action, and it was held there that the plaintiff was entitled to maintain his action, and that upon the original conveyance to the defendant there was a reservation to the grantor of the right to carry away this water which came from the defendant's premises by the medium of the drain which also went through his premises. Though those circumstances were special in their character, there is no doubt that the principles laid down by the Court of Exchequer were as wide as possibly could be. That court laid down that there was no distinction between implied reservation and implied grant; and this, as it appears to me, broke the hitherto unbroken current of authority upon this subject.

Now, although it is possible that the actual decision in *Pyer v. Carter* was not exactly overruled, the principles there laid down were clearly and distinctly overruled by the same court in *White v. Bass*, 7 H. & N. 722; the facts of which case were these: A man was the owner of certain land and of a certain house which had windows through which the light, not as an easement but as a matter of enjoyment, had come for some time. He let the land (reserving the house) to trustees, subject to certain covenants by which they were to build in a particular manner upon the land, and if those covenants had been complied with, and they had built in the specific manner, there would have been no obstruction to the lights of the house which the grantor or the lessor reserved. Therefore, if we were entitled in these cases to go back to matters which existed before the time of the conveyance, we should have found here, as clearly as could be shown, an intimation on the part of the lessor that if building was to be permitted on the adjoining land, it was only to be permitted under such conditions as would prevent the lights of the house being obstructed. But that being originally the position of matters it was followed by a conveyance of the reversion in the land to the trustees, and subsequently to that conveyance the house was conveyed to another person, and buildings having been put upon the land occupied by the trustees contrary to the terms of the original covenant, and of such a kind as obstructed the lights of the house, an action was brought by the person to whom the house was conveyed. In that action it was decided that the defendant held his land unfettered by the original covenant, and unfettered by any implied reservation, and that he was entitled to build in such a way as he thought proper on his land, although the effect of what he did might be to obstruct the lights of the plaintiff. In giving judgment Lord Chief Baron Pollock says this (7 H. & N. 730): "My Brother Petersdorff has cited no authority for the precise matter which he has urged before us, and I think that in construing a conveyance of land we must collect what the parties intended from the language they have used. It seems to me that we cannot look into the lease of the 2d of October, 1855, for it is merged in the fee, a conveyance of the reversion having

been made to the lessees, and we must look to that conveyance alone in order to ascertain the rights of the parties. In that conveyance there is no covenant by the purchasers not to build on the land so as to obstruct the light and air coming to the windows of the plaintiff's house, nor indeed any limitation of the right to use the land." Now, no case can be more clear and distinct upon the point which we have to decide to-day, and the case is admitted by Sir Henry Jackson to be such; but he suggested that we ought to overrule it as being an exception to the general current of authority. So far from that being the case, *Pyer v. Carter* appears to me to have been the exception, and not *White v. Bass*.

The latter case was followed by *Suffield v. Brown*, 4 D. J. & S. 185. A good deal has been said about that case; and the principles upon which this court ought to act in dealing with decisions of courts of co-ordinate authority have been also discussed. I think I may say for myself (and I believe I am expressing the views of the other members of the court) that we ought not to lay down as an absolute rule that decisions of Lord Chancellors, at all events sitting alone, are to be taken as decisions of the Court of Appeal, and absolutely binding on this court so as to prevent us from even looking into the grounds or considering the case which was before the particular Lord Chancellor. But no doubt the greatest weight ought to be given to such decisions, and unless they are shown to be manifestly wrong or manifestly contrary to the general current of authority on the point decided, it appears to me that we ought not to take upon ourselves to overrule them.

That being so, let us look a little more narrowly into that case. First, we have to see what was decided — and by that I do not mean what was absolutely necessary to be decided, but what really the Lord Chancellor took upon himself to decide, and, although he might have decided the case upon other grounds, put as his *ratio decidendi*. Upon that point there can be no doubt. We have only to read the close of his judgment to see that he put it entirely upon this principle, which I have stated as the second of the general rules applicable to cases of this kind, that a man cannot derogate from his own grant, and that as a general rule no implication can be made of a reservation of an easement to the grantor, although there may be an implication of a grant to the grantee. The Lord Chancellor closes his judgment by saying (having dealt with some of the authorities as to continuous and apparent easements): "But this is irrelevant to my decision, which is founded on the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made." Although, therefore, it is perfectly true that, looking to the special circumstances of that case, it might have been decided upon those special circumstances so as even to admit the proposition for which Sir Henry Jackson contends, it is equally clear that the Lord Chancellor did not so decide the case, but decided it upon a distinct negative of that proposition. If we were to stop here, it seems to me

that, looking to the fact that this was not a case in which this point in question was mooted for the first time, but that the point had been mooted and decided as early as the third year of the reign of Queen Anne, we should not be justified in doing anything but follow the principles enunciated by Lord Westbury.

But *Suffield v. Brown* has been confirmed by an equally high authority, for in *Crossley & Sons v. Lightowler*, Law Rep. 2 Ch. 478, Lord Chelmsford as Lord Chancellor had to deal with a similar question, and he there says: "Lord Westbury, however, in the case of *Suffield v. Brown*, refused to accept the case of *Pyer v. Carter* as an authority, and said, 'It seems to be more reasonable and just to hold that if the grantor intends to reserve any right over the property granted it is his duty to reserve it expressly in the grant rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by the fiction of an implied reservation.' I entirely agree with this view. It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it unless he shows the contrary by expressly reserving it. The argument of the defendants would make, in every case of this kind, an implied reservation by law; and yet the law will not reserve anything out of a grant in favor of a grantor except in case of necessity."

Now the only case in the Court of Appeal which is suggested as being contrary to this high authority of two Lord Chancellors, is *Watts v. Kelson*, Law Rep. 6 Ch. 166, 174; and no doubt there are observations of Lord Justice Mellish to the effect that the order of conveyance in point of date is immaterial, that *Pyer v. Carter* is good sense and good law, and that most of the common law judges have not approved of Lord Westbury's observations. But, putting aside for the moment that this was a mere *dictum* of the Lord Justice during the argument, I must observe that this is not exactly so, as in *White v. Bass* the judges of the Court of Exchequer had distinctly, as regards the reasoning of *Pyer v. Carter*, overruled that case. No doubt, also, Lord Justice James says, "I am satisfied with the decision in *Pyer v. Carter*." But in the considered judgment of the court, when if it had been intended to say that *Suffield v. Brown* was not law, one would have thought there would have been something distinct upon the point, there is not one word to the effect of that which had been said by the Lords Justices during the argument. All that is said about it is this. Lord Justice Mellish, who delivered the judgment, after referring to *Nicholas v. Chamberlain*, said, "This case has always been cited with approval, and is identical not only in principle but in its actual facts with the case now before us. It was expressly approved of by Lord Westbury in *Suffield v. Brown*, where, though he objected to the decision in *Pyer v. Carter*, in which it was held that a right to an existent continuous apparent easement was impliedly reserved in the conveyance by

the owner of two houses in the alleged servient houses, yet he seems to agree that the right to such an easement would pass by implied grant where the dominant tenement is conveyed first;" and that is what the Court of Appeal had to decide in *Watts v. Kelson*, Law Rep. 6 Ch. 166. Therefore *Watts v. Kelson* is no authority to justify us in overruling *Suffield v. Brown*, still less for overruling it supported as it is by the case of *Crossley & Sons v. Lightowler*. Thus, then, as it appears to me, stand the principal authorities on the general rules of law which I stated at the commencement of this judgment.

Other cases which have been cited during the argument illustrate the exceptions to the second of those general rules. As I have already said, there is an undoubted exception in cases where the easement is what is called a way of necessity. Thus in *Pinnington v. Galland*, 9 Ex. 1, 12, which was a case for disturbance of a right of way, there were five closes, two of them called the Holme Closes, which were separated by the others from the only available highway, and which were conveyed subsequently in point of time to the conveyance of the remaining closes through which this way *de facto* ran. In deciding that the way still existed, Baron Martin appears to me to have put the case entirely upon the exception to which I am referring. He says this: "Secondly, assume that the conveyance to Mr. Dearle was executed the first. In this case the Rye Holme Closes were for a short period of time the property of Mr. Dickinson after the property in the land conveyed to Mr. Dearle had passed out of him. There is no doubt apparently a greater difficulty in holding the right of way to exist in this case than in the other; but according to the same very great authority the law is the same, for the note 1 Wms. Saund. 323, n., proceeds thus: 'So it is when he grants the land and reserves the close to himself;' and he cites several authorities which fully bear him out: *Clark v. Cogge*, Cro. Jac. 170; *Staple v. Haydon*, 6 Mod. 1; *Chichester v. Lethbridge*, Willes, 72, n. It no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in *Dutton v. Taylor*, Lutw. 1487, that it was for the public good, as otherwise the close surrounded would not be capable of cultivation." Now those last words clearly show that the whole foundation of the judgment in the case of *Pinnington v. Galland* was that the way claimed in the case was a way of necessity, and it is equally clear, as it seems to me, that Baron Martin and the court whose judgment he delivered in no way disputed the general maxims to which I have referred. The case of *Davies v. Sear*, Law Rep. 7 Eq. 427, 431, also appears to me to have been decided on the same basis. There a man, a builder, had got a lease of land for the purpose of building upon that land, and he proposed to build upon it in such a way as that through an archway, which was, at all events, standing to such an extent as to show that it was intended to be used for a passage — that through that archway should be the only means of communication with certain stables

which were to be erected. That being the position of things, a portion of the land was sold to a third person, and the question arose whether it was open to that person to build upon his land in such a way as to obstruct this one only way into the stable. The Master of the Rolls (Lord Romilly) held that it was not. And why? He founded his opinion upon the basis of this exception to which I am referring. He says: "The question is, whether the defendant has a right to shut up the archway, and to intercept all access to Erskine Mews through this passage. This depends upon whether this easement is reserved by implication on the assignment of the house to the defendant; and this depends upon whether the easement is apparent, and also is a way of necessity."

These cases in no way support the proposition for which the appellant in this case contends; but, on the contrary, support the propositions that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favor of the grantor of land.

Upon the question whether there is any other exception, I must refer both to *Pyer v. Carter* and to *Richards v. Rose*, 9 Ex. 218; and, although it is quite unnecessary for us to decide the point, it seems to me that there is a possible way in which these cases can be supported without in any way departing from the general maxims upon which we base our judgment in this case. I have already pointed to the special circumstances in *Pyer v. Carter*, and I cannot see that there is anything unreasonable in supposing that in such a case, where the defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied; and, although it is not necessary to decide the point, it seems to me worthy of consideration in any after case, if the question whether *Pyer v. Carter* is right or wrong comes for discussion, to consider that point. *Richards v. Rose*, although not identically open to exactly the same reasoning as would apply to *Pyer v. Carter*, still appears to me to be open to analogous reasoning. Two houses had existed for some time, each supporting the other. Is there anything unreasonable — is there not, on the contrary, something very reasonable — to suppose in that case that the man who takes a grant of the house first and takes it with the right of support from that adjoining house, should also give to that adjoining house a reciprocal right of support from his own?

One other point remains, and that I shall dispose of in a very few

words. It is said that, even supposing the maxims which I have stated to be correct, this case is an exception which comes within the rule laid down in *Swansborough v. Coventry*, 9 Bing. 305, and *Compton v. Richards*, 1 Price, 27; namely, that although the land and houses were not in fact conveyed at the same time, they were conveyances made as part and parcel of one intended sale by auction. It seems to me that that proposition cannot be supported for one moment. We start here with an absolute conveyance in January, 1876. What right have we to look back to any previous contract or to any previous arrangement between the parties? If it had been the case of an ordinary contract, and there had been parol negotiations, it is well established law that you cannot look to those parol negotiations in order to put any construction upon the document which the parties entered into for the purpose of avoiding any dispute as to what might be their intentions in the bargain made between them. The same rule of law applies, and even more strongly in the case of a conveyance, which alone must regulate the rights of the parties. In the cases which have been cited the conveyances were founded upon transactions which in equity were equivalent to conveyances between the parties at the time when the transactions were entered into, and those transactions were entered into at the same moment of time and as part and parcel of one transaction. There may be, and there is, according to *Swansborough v. Coventry*, another exception to the rule which I have mentioned; but here the sale by auction was abortive as regards the defendant's property. There was a conveyance in January of the plaintiff's property without any reservation, and there was no contract of purchase on the part of the defendant until more than a month after that conveyance had been complete. I believe I am expressing the view of the other members of the court when I say that it appears to the court that under such circumstances there is no exception to the general rule. For these reasons, therefore, the appeal should be dismissed.

JAMES, L. J. The Lord Justice has been kind enough to express the judgment of the court. I only want to say something in addition, that in the case of *Nicholas v. Chamberlain* the court seems to have really proceeded on the ground that it was not an incorporeal easement, but that the whole of the conduit through which the water ran was a corporeal part of the house, just as in any old city there are cellars projecting under other houses. They thought it was not merely the right to the passage of water, but that the conduit itself passed as part of the house, just like a flue passing through another man's house. The appeal is dismissed, with costs.

BAGGALLAY, L.J., concurred.

Horton Smith, Q. C., and *Romer*, for the plaintiff.

Sir H. Jackson, Q. C., and *Colt*, for the appellant.¹

¹ Where both lots are sold at the same time, the purchaser of the vacant lot cannot build so as to shut up the windows of the house. *Swansborough v. Coventry*, 9 Bing. 305 (1832); *Allen v. Taylor*, 16 Ch. D. 355 (1890). See *Russell v. Watts*, 25 Ch. Div. 550 (1885); 10 Ap. Cas. 590.

BROWN v ALABASTER.

CHANCERY DIVISION. 1887.

[Reported L. R. 37 CA. D. 490.]

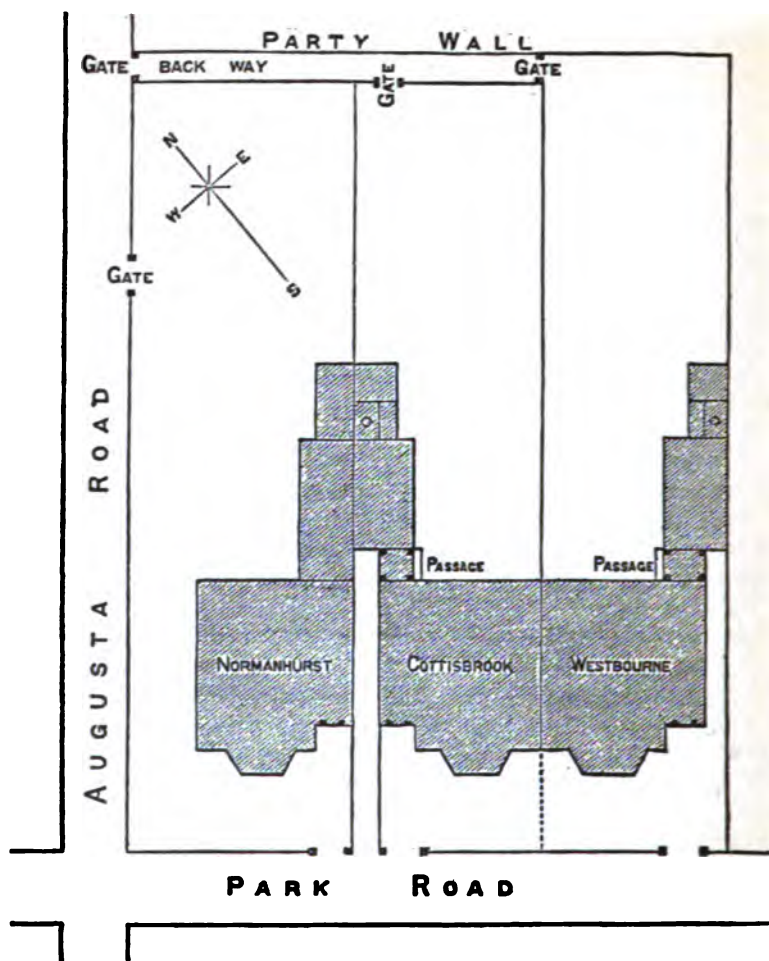
By a lease, dated the 5th of October, 1877, a plot or piece of building land at the corner of Augusta Road and Park Road, at Moseley, Worcestershire, and indicated on a plan in the margin of the lease, was demised by the lessors to William Letts, without any general words, for the term of ninety-nine years at the rent thereby reserved, a right being granted to Letts of erecting a party-wall on the north-east boundary of the land.

By another lease of the same date a larger plot or piece of building land immediately adjoining, and indicated on a plan in the margin of the lease, was demised by the same lessors to Letts, "together with all ways, rights, easements, and appurtenances belonging thereto," for the term of ninety-nine years at the rent thereby reserved, a right being granted to Letts of erecting a party-wall on the north-east boundary of the land.

Shortly after the date of the leases Letts built a boundary or party-wall along the north-east side of both plots, and on part of the first plot he built a house called "Normanhurst." The second or larger plot he divided into two, and on part of the half plot next "Normanhurst" built a house called "Cottisbrook," and on part of the other half plot a house called "Westbourne." All three houses fronted towards, and had entrances into, Park Road, the ground behind each being enclosed and laid out as a garden.

The garden of "Westbourne" extended right up to the above-mentioned party-wall, but the gardens of "Cottisbrook" and "Normanhurst" stopped about four feet short of it, a strip of land thus being left between the party-wall and those two gardens. This strip of land thus divided off and separated from the other land comprised in the two leases, Letts laid out as a back private way from Augusta Road to the gardens of "Cottisbrook" and "Westbourne," this back-way being inclosed throughout its length on the one side by the party-wall and on the other by the garden walls of "Normanhurst" and "Cottisbrook." "Cottisbrook" and "Westbourne" each had a gate in its garden wall opening into the back-way, but "Normanhurst" had none, as it had a side entrance directly into Augusta Road. The entrance from the back-way into Augusta Road, which was a public road, was closed by a gate which was usually kept locked, and of which, until the assignment to the defendant hereafter stated, Letts or his agent had the key.

The following is a plan of the properties : —



The back-way having thus been formed and used as a mode of access to the gardens of "Cottisbrook" and "Westbourne," by an indenture, dated the 29th of June, 1878 — after reciting the second lease and the erection of the two houses "Cottisbrook" and "Westbourne" — Letts assigned to John Aston and George Lyttelton Aston, "All and singular the said piece of land and premises comprised in and demised by the hereinbefore recited indenture of lease or expressed so to be, and also all those the said two messuages erected on the said piece of land, together with their and every of their rights, members, and appurtenances," for the residue of the said term of ninety-nine years granted by such lease, by way of mortgage for securing £950

and interest. The terms of that assignment thus included the site of so much of the back-way as was conterminous with "Cottisbrook."

By an indenture of the 2d of July, 1878, Letts assigned the plot of land demised by the first lease, and also the house thereon, called "Normanhurst," "with their and every of their appurtenances," to John Careless for the residue of the term by way of mortgage for securing £700 and interest. The plot of land comprised in that assignment was therein described by identically the same description as that in the lease, and consequently the assignment included the soil of so much of the back-way as was conterminous with "Normanhurst."

By an indenture of the 14th of December, 1878, after reciting the second lease of the 5th of October, 1877, with the description of the plot comprised therein, and also the mortgage of the 29th of June, 1878, to J. Aston and G. L. Aston, Letts and his said mortgagees, J. Aston and G. L. Aston, for the considerations therein mentioned, assigned to the defendant Edward Alabaster, for the residue of the term granted by that lease, and discharged from the mortgages thereon, "All the said piece or parcel of land, hereditaments, and premises by the said indenture of the 5th day of October, 1877, expressed to be demised, together with the two messuages or dwelling-houses ('Cottisbrook' and 'Westbourne') erected thereon since the date of the said lease, with their rights, easements, and appurtenances." Upon the execution of that assignment Letts handed to the defendant the keys of the garden gates of "Cottisbrook" and "Westbourne," and also the key of the gate leading from the back-way into Augusta Road.

By an indenture of the 18th of November, 1879, Letts, for the consideration therein mentioned, assigned the plot of land "comprised in and demised by" the first lease, and also the house thereon called "Normanhurst," together with the appurtenances, to one Flint, absolutely, for the residue of the term, but subject to the mortgage to Careless: and by an indenture of the 18th of December, 1880, Careless and Flint, for the consideration therein mentioned, assigned the same premises to the plaintiff, Henry Brown, for the residue of the term, discharged from the mortgage thereon.

Neither of the assignments of "Normanhurst" contained any reservation in terms of a right of way for the owners or occupiers of "Cottisbrook" or "Westbourne" over the piece of private way at the back of "Normanhurst," and, in fact, none of the deeds relating to the several properties noticed the existence of the back-way, or contained any reference to it in express terms. There were no plans to any of the deeds except the two original leases, and each of those plans showed simply a rectangular piece of land colored pink, which included the soil of the corresponding piece of the back-way, but without any line or other indication of an intended back-way.

Disputes having arisen between the plaintiff and the defendant as to whether the defendant had, under the assignment to him, any right

of way over the plaintiff's piece of the private way at the back of "Normanhurst," the plaintiff brought this action, claiming a declaration that the defendant was not entitled, as against the plaintiff, to any right of way from or to the defendant's two houses over or across the plaintiff's land demised by the first lease to or from Augusta Road; and an injunction to restrain the defendant from passing over or otherwise trespassing upon the plaintiff's said land.

In his statement of claim the plaintiff alleged that none of the deeds under which he and the defendant respectively claimed, contained any reservation or grant of any right of way over the land demised by the first lease to or for the benefit of the owner, lessee, or occupier of the hereditaments comprised in the second lease; and that, consequently, the defendant was not entitled to any such right of way.

The statement of defence contained the following allegations:

"(7.) Prior to and at the date of the said indenture of the 14th of December, 1878" — the assignment of "Cottisbrook" and "Westbourne" to the defendant — "and prior to the 29th of June, 1878" — the date of the mortgage of those two properties — "the said way or passage was, and ever since has been, necessary for the proper enjoyment of the part of the land and houses conveyed thereby and for which it had been previously used. Without the said way or passage, egress or ingress from the back part of the two houses could not and cannot be made. It was a continuous and apparent way or passage used by the said William Letts, the common owner of what is now the plaintiff's and defendant's land, previous to and at the time of the making of the said indenture and prior to the 29th of June, 1878, and was necessary for the comfortable enjoyment of the part granted by him to the defendant; and by the grant of the land and houses thereon of the 14th of December, 1878, the said William Letts passed the right of way over the said way or passage to the defendant.

"(8.) The said way or passage was incident to the defendant's grant under the indenture of December 14th, 1878, which recited the indenture of the 29th of June, 1878.

"(9.) Furthermore, there was at the time of the making of the indentures of the 29th of June, 1878, and of the 14th of December, 1878, an implied grant of the way or passage to the defendant, and the said J. Aston and G. L. Aston." And lastly, the defendant insisted that for the reasons aforesaid the plaintiff was not entitled to the declaration or relief he asked.

The plaintiff thereupon joined issue, and the action now came on for trial.

A plan of the property — of which plan the above is a reduced copy — was put in evidence; and it was in fact admitted by the plaintiff that at the dates of the indentures of the 29th of June, 1878, and the 14th of December, 1878, the back-way was existing as shown on the

plan, with the two gates opening into the gardens of "Cottisbrook" and "Westbourne."

The plan also showed, as the fact was, that "Cottisbrook" and "Westbourne" each had, in addition to the usual front or main entrance to the house, a side or tradesmen's entrance by an open passage about five feet wide from Park Road, leading up to a side door, which by one step upwards gave admission into a back hall or passage about four feet wide, paved with encaustic tiles, and communicating on one side with the entrance-hall of the house and on the other with the kitchen and other domestic offices. At the further end of this back hall or passage, a door opened by two descending steps into the back garden of the house. Beyond the kitchen and offices were a privy and midden; and the evidence showed that in the absence of a right of way from Augusta Road to the garden and back premises of the house, the only mode of conveying manure, &c., into the garden, or of carrying away refuse from the back premises, was by going through the tiled passage or back hall of the house. The plaintiff's surveyor admitted in cross-examination that the back-way was essential to the comfortable enjoyment of each of the two houses, as being the only convenient way by which manure could be taken into the garden, coals brought into the house, or the contents of the midden and privy removed.

Methold, for the plaintiff.

Marten, Q. C., and *Horace Browne*, for the defendant.

KAY, J. This case raises a question of very considerable interest, which has been discussed in a great many authorities, several of which have been cited to me.

[His Lordship, after describing the three properties, "Westbourne," "Cottisbrook," and "Normanhurst," and the approaches to the gardens of the two first-mentioned properties from Park Road in front through the passage or back hall, and from Augusta Road by the back-way at the rear, said it was obvious that the passage or back hall was not intended for the removal of garden manure, or anything of that kind, and could not really be conveniently used for that purpose, and that at the date of the assignment of the 14th of December, 1878, by which "Westbourne" and "Cottisbrook" became vested in the defendant, and of the assignment of the 13th of November, 1879, by which "Normanhurst" became vested in the plaintiff's immediate predecessor in title, the back-way was the most convenient way, and an obviously intended convenience, for approaching the gardens of "Westbourne" and "Cottisbrook," and that it did not afford any communication whatever to the garden of "Normanhurst," which was completely walled off from it. His Lordship then stated the two last-mentioned assignments and the assignment in 1880 to the plaintiff, and proceeded:—] So that the plaintiff took, by conveyance, "Normanhurst," after "Cottisbrook" and "Westbourne" had been sold and conveyed to the defendant. At the time

the defendant bought, this formed back-way was existing, and there were gates from it into the gardens both of "Westbourne" and "Cottisbrook."

Now, the question is, whether the conveyance to the defendant, which contains nothing applicable to a right of way along this back-way, but the ordinary general words "rights, easements and appurtenances," passed a right of way through those gates from the gardens of "Cottisbrook" and "Westbourne" along this back-way into Augusta Road.

Of course at the time when the conveyance was made this right of way was in no sense an easement, because all three properties belonged to the same person; and the question divides itself into two — first of all, was this way a way of necessity? And, secondly, if it was not a way of necessity, could it be held to pass by implied grant?

Now, as a way of necessity I think it is difficult to support it, for the following reason. A way of necessity is not a defined way. A way of necessity is a way which is the most convenient access to a land-locked tenement over other property belonging to the grantor; and it is quite clear that the grantor has a right himself to elect in which line, in which course, the way of necessity should go. Here, there is no case of election. The claim is to a way over this particular road, without any right of election at all on the part of the grantor. That of itself would be enough to show it is not a way of necessity. But there is also this consideration; if it be a way of necessity, then, whether it had been formed or not, the way would pass over the ground of "Normanhurst"; that is to say, supposing there had been no back-way and the gardens of "Westbourne" and "Cottisbrook" had been completely shut off from communication with any road except through the passages in these houses, the tiled passages which I have described, if the purchasers of "Cottisbrook" and "Westbourne" were entitled to ways of necessity, it must follow that "Westbourne," which is the most eastern of these properties, would be entitled to a way of necessity over the ground of "Cottisbrook," and over the ground of "Normanhurst," and that "Cottisbrook," which is the middle one, would be entitled to a way of necessity over the ground of "Normanhurst." To my mind it is clearly impossible so to hold, because, if any one had bought "Westbourne" or "Cottisbrook" without any access over the ground of "Normanhurst" to Augusta Road, but only with access to the garden by means of a tiled passage, it seems to me quite impossible to say that he should also have over the adjoining land, which was then a garden laid out as the garden of the house, a way in some direction or another into Augusta Road. Therefore I am clearly of opinion that this is not a way of necessity.

Then comes the question whether, even if it be not a way of necessity, it may not pass under the doctrine of an implied grant of a con-

tinuous and apparent easement. It is said, and forcibly, that a right of way is not a continuous and apparent easement, and for that is cited a passage from Mr. Gale's well-known book; but no other authority has been cited.

Let us see how the law stands. In the case of *Hinchliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1, part of the tenement granted consisted of a coal shoot and of certain pipes, and Lord Chief Justice Tindal said, 5 Bing. N. C. 24: "We cannot therefore feel any doubt, but that under the description contained in the lease, the coal shoot and the several pipes passed to the lessee as a constituent part of the messuage or dwelling-house itself."

In that case there was over an adjoining tenement of the lessor a passage by which this coal shoot and the pipes could be approached, and the jury found in their verdict that the passing and re-passing over that way or passage was not merely convenient but necessary "for the use of the coal shoot, and of the pipes, and of the repairing and amending the same, and the side or wall of the house." Upon that the judgment proceeds, 5 Bing. N. C. 25: "Since, therefore, as it appears to us, the right in question" (that is the right of passing to and from this coal shoot and pipes) "passed to the lessees under the reversionary lease of 1819, as incidental to the enjoyment of that which was the clear and manifest subject matter of demise, it becomes unnecessary to consider the question argued at the bar before us, how far the same right might or not pass to the lessees under the express words used in the lease itself, as 'an appurtenant unto the said piece or parcel of ground, messuage or tenement, erections, buildings, and premises, belonging or appertaining.' There are strong authorities in the law books to show these words capable of a wider interpretation, and of carrying more than is an *appurtenant* in the strictly legal sense of that word, where such interpretation is necessary in order to give that word some operation." The learned Judge refers to the cases and then says: "But we think it at once sufficient, and at the same time safer, to rely upon the ground on which we have already held that the right claimed by the plaintiff may be supported, and to give no opinion on this second point." That case has been followed and commented on in a great many subsequent cases.

The rule laid down in Sheppard's Touchstone, page 89, is that, by the grant of anything, "*conceditur etiam et id sine quo res ipsa non esse potuit.*" That seems to be really the case of a way of necessity.

In *Langley v. Hammond*, Law Rep. 3 Ex. 161, there was a surrender by a lessee to his lessor of part of the demised premises, "together with all ways, &c., therewith now used, occupied, and enjoyed;" and in that case Lord Bramwell's words, which have been referred to in subsequent cases, were these (Law Rep. 3 Ex. 170): "Suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to

be the property of the owner of the house. I should wish for time to consider before deciding that on the conveyance of the house the right to use that road, not being a way of necessity, would not pass under such words as these." Those words being, as I have said, "therewith now used, occupied, and enjoyed." That was the point which was raised in the well-known case of *James v. Plant*, 4 Ad. & E. 749.

In the later well-known case of *Watts v. Kelson*, Law Rep. 6 Ch. 166, Lord Justice Mellish, in delivering judgment, said (Law Rep. 6 Ch. 174): "We may also observe that, in *Langley v. Hammond*, Law Rep. 3 Ex. 161, Baron Bramwell expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words." I think there is a mistake there: the words before Lord Bramwell were not the ordinary words, but were extraordinary general words, such as those used in *James v. Plant*, 4 Ad. & E. 749.

In an earlier authority — *Pearson v. Spencer*, 3 B. & S. 761 — the case is thus stated in the head-note: "Where the owner of a farm divided it by his will into two portions, devising them to *A.* and *B.* respectively, and the portion of *B.* was landlocked, so that in order to reach it it was necessary that he should have a right of way over the property of *A.*, and the devisor during his life had used a way in a certain direction over that property: held, affirming the decision of the Queen's Bench, that a right to use that way passed to *B.* by the devise."

Now I pause there to say that this is distinctly an advance of the doctrine. That particular way was not of course necessarily a way of necessity. It was not held that a way of necessity passed, but that this particular way passed, and the ground of the judgment given by Chief Justice Erle is this (3 B. & S. 767): "We have been much struck with the argument of Mr. Mellish, in which he contended that, if this right of way were taken as a right of way of necessity simply, the way claimed by the defendant could not be maintained; because we are inclined to concur with him that a way of necessity, strictly so called, ends with the necessity for it, and the direction in which the plaintiff says the way ought to go would so end. But we sustain the judgment of the Court below on the construction and effect of James Pearson's will taken in connection with the mode in which the premises were enjoyed at the time of the will. The testator had a unity of possession of all this property; he intended to create two distinct farms with two distinct dwelling-houses, and to leave one to the plaintiff and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Then the devise of the farm contained, under the circumstances, a devise of

a way to it, and we think the way in question passed with that devise. It falls under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependance*, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement. There are rights which are implied, and we think that the farm devised to the party under whom the defendant claims could not be enjoyed without dependance on the plaintiff's land of a right of way over it in the customary manner." There is the distinct decision of the Court of Exchequer Chamber that a way in a particular defined route which is not a way of necessity may, nevertheless, pass by implied grant — implied grant, that is, by the owner who has unity of possession both of the close granted and of the adjoining close over which that particular way passed.

In *Wheeldon v. Burrows*, 12 Ch. D. 31, as is well known, the Court of Appeal drew a distinction on the much-contested question what rights were reserved to a grantor, and the distinction, as taken in the language of Lord Justice Thesiger, which has been much considered and approved of by other Judges, and which has been often quoted since, is this (12 Ch. D. 49): "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi*-easements)" — and the interpretation there interposed is necessary, because, where the owner of two tenements grants one of them, there can be no easement at the moment of the grant over the other tenement, the two tenements having belonged to one and the same person, and an easement being a right over the land of somebody else — "or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." That is the broad distinction which has been recognized, as far as I know, ever since, between the implied grant of an easement and the reservation of an easement.

In the case of *Bayley v. Great Western Railway Company*, 26 Ch. D. 434, the point came before the Court of Appeal. That was a case where the railway company had purchased a piece of land on which was a stable, and by the conveyance to the company the premises were granted "with all rights, members or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member thereof." The vendor had many years previously made a private road from the highway into the stable over his own land for

his own convenience, and had used it ever since. The soil of the road was not conveyed to the company, and no express mention of it was made in the conveyance, and it was held that, notwithstanding the unity of possession of the stable and private house, the right of way passed to the company under the general words of the conveyance. In that case Lord Justice Bowen says this, 26 Ch. D. 453: "This particular case is not a case of a way of necessity, though I do not say that there might not be ways which would pass by implication as ways of necessity, even if they were only reasonably necessary and not physically necessary." I do not mean to rely in the least on that dictum, because, as I have said, here we have not got the case of a way of necessity.

But there is another authority of *Ford v. Metropolitan Railway Companies*, 17 Q. B. D. 12, which was before the Court of Appeal. The case is thus stated in the head-note: "A house was divided into a front and a back block: and the plaintiffs were lessees of three rooms on the first floor in the back block. The lease did not expressly grant any mode of access. Access to the rooms demised to the plaintiffs was gained from the street by passing through a hall or vestibule, and then up some stairs to the plaintiffs' rooms. The defendants, in the exercise of compulsory powers under the *Railways Clauses Consolidation Act*, took down the front block of the house and removed the hall. The interference with the hall and the injury to the access to the rooms of which the plaintiffs were lessees, lessened their value. An arbitrator having awarded compensation to the plaintiffs under the *Lands and Railways Clauses Consolidation Acts*:—Held, that the award was valid on the grounds, first, that compensation may be obtained under the *Railways Clauses Consolidation Acts*, 1845, for injury done to land by the execution of the works, if it is sufficient to lessen the value thereof; secondly, that the access through the hall was not a way of necessity, but was in the nature of a continuous and apparent easement which passed under the demise of the rooms, and that an interference with this *quasi-easement* was sufficient to give rise to a valid claim for compensation."

That was not a case which depended upon any extraordinary general words like "used and enjoyed;" but the Court, on looking at the surrounding facts, found there was a formed mode of access through other property adjoining belonging to the grantor, and accordingly came to the conclusion that there was an implied grant of that particular formed mode of access, although there were no special words referring to it, and no general words which could extend the grant, like the words "usually held and enjoyed therewith." Indeed it has been doubted—and on that there seems to be a present conflict of authority—whether those words "usually held and enjoyed" have any effect in a matter of this kind; because Lord Romilly, M.R., in *Thomson v. Waterlow*, Law Rep. 6 Eq. 36,

said the question was, whether you could, by those words, create an easement. That doubt of his is commented upon in *Kay v. Oxley*, Law Rep. 10 Q. B. 860, by Lord Blackburn, who says (Law Rep. 10 Q. B. 867), "But I cannot agree that, upon the construction of words like those in the conveyance here in question, they cannot as a matter of law create a right of way that did not previously exist as a right."

I leave that contest where it is; but it seems to me that the law is this—that a particular formed way to an entrance to premises like these, "Westbourne" and "Cottisbrook," which leads to gates in a wall, part of these demised premises, and without which those gates would be perfectly useless, may pass, although in some sense it is not an apparent and continuous easement; or rather, may pass—because, being a formed road, it is considered by the authorities, in cases like this, to be a continuous and apparent easement—by implied grant without any large general words, or indeed without any general words at all.

Here I have a case in which these two gardens, although they are not absolutely inaccessible, are inaccessible except through a part of the house, unless they are to be reached by the gates at the bottom of the gardens communicating with this formed back-way. That it was intended, looking at all the facts, that the persons to whom "Westbourne" and "Cottisbrook" were conveyed should have the use of those two gates and of this back-way, is, to my mind, beyond all doubt. Then, although I agree that it is not for all purposes a way of necessity, do I want any express grant? It seems to me to be clear on the authorities that an express grant is not wanted in such a case as this.

Therefore I hold that the right to use this back-way in the same mode as it was usable by the occupiers of "Cottisbrook" and "Westbourne" at the time of the grant of these properties did pass by implied grant, and accordingly this case must be decided on that footing. The plaintiff, the present owner of "Normanhurst," seeks a declaration that the defendant is not entitled to have a right of way. I cannot make that declaration; on the contrary, I make the declaration that the defendant is entitled to the right of way as I have described it, and the plaintiff must pay the costs of the action.¹

¹ See *Thomas v. Owen*, 30 Q. B. D. 225 (1887).

PHILLIPS v. LOW.

CHANCERY DIVISION. 1891.

[Reported *L. R.* [1892] 1 CA. 47.]

THE plaintiff, Arthur Phillips, was the owner in fee of a messuage known as Meadowcroft, at Catford, in the county of Kent, and the plaintiff Buck was the lessee thereof.

The defendants were the owners in fee of the land lying to the north of and adjoining Meadowcroft, and had obstructed the light and air coming thereto by erecting a building, and placing boardings on the land close to the messuage.

The messuage and land formerly both belonged to one J. J. Stainton, who died possessed thereof in the year 1875, he having previously built the messuage as a washhouse, stables, billiard room, and observatory, and it was the access of light and air to a door and windows in such messuage which the defendants had obstructed.

At the time the messuage was built and down to the time of the death of J. J. Stainton the only building standing on the land to the north of the messuage was a cottage called Laurel Lodge, surrounded by a garden occupied by one G. T. Williams, and not interfering in any way with any light or air coming to the messuage.

J. J. Stainton made his will dated the 30th of June, 1875, and thereby devised to G. T. Williams the cottage called Laurel Lodge, together with the land thereto adjoining up to the boundary of Meadowcroft, and devised all the residue of his freehold-property to trustees upon trust for sale.

The plaintiff Phillips became entitled to Meadowcroft under an exercise of the trust for sale contained in the said will. The defendants purchased Laurel Lodge and the adjoining land from G. T. Williams.

The plaintiff, Buck, resided in one part of Meadowcroft, and carried on business as a coachbuilder on the other part thereof.

In August, 1890, the defendants commenced to build a lodge on the north side of Meadowcroft within a few inches thereof which almost entirely obstructed the light and air coming to the door and windows in such messuage.

Complaints were made by the plaintiffs to the defendants that they were not entitled to build the lodge, and the defendants insisting that they had such right, the writ in this action was issued on the 26th of January, 1891, and on the 29th of January the defendants commenced to erect, and shortly afterwards completed a boarding painted black within six inches of most of the windows and openings in Meadowcroft.

A motion was made in this action for an injunction to restrain the obstruction to the access of light and air as aforesaid, whereupon the

defendants undertook without prejudice to remove the boarding and the motion was ordered to stand till the trial.

The plaintiffs claimed that the defendants might be restrained from obstructing or interfering with the access of light and air coming to Meadowcroft, and that they might be ordered to remove the building already erected by them, or to pay to the plaintiffs damages for obstructing and interfering with the access of such light and air.

The action now came on for trial.

Byrne, Q. C., and *Yate Lee*, for the plaintiffs.

Farwell, Q. C., and *Pattison*, for the defendants.

CHITTY, J. Nothing turns on the particular language of the will — that is admitted. The circumstance that the devise of the defendants' tenement is expressed to be made free of incumbrances, that it is a specific devise in form, and that the plaintiffs' tenement is comprised in a residuary devise of messuages, are all immaterial, and rightly admitted to be so. The term "incumbrance" does not affect the question of light; and a devise of land, though in form residuary, is specific: *Lancefield v. Iggulden*, Law Rep. Ch. 136.

The question, then, may be stated in this simple form: A man being seised in fee in possession of a house with windows, and of an adjoining field over which the light required for the windows passes, devises the house to one and the field to another; does the right to the light over the field pass to the devisee of the house, or is the devisee of the field entitled to block up the windows?

If the owner of the house and field by deed for value grants the house but retains the field, it is settled law that a right to the light required for the enjoyment of the house passes to the grantee. Why? The reason stated in *Palmer v. Fletcher*, 1 Lev. 122, the leading case on the subject, is that "the lights are a necessary and essential part of the house." In other words, what is conveyed is not a mere brick or stone building with apertures called windows, but a house with windows enjoying light. This is the broad, substantial reason which commends itself at once to the common sense of mankind. Worked out somewhat more technically, the conveyance operates as an implied grant of the light. Blocking up the windows by the grantor is regarded as an attempt on his part to derogate from his grant — a form of expression which assumes that the right to light has passed to the grantee. The implication does not necessarily arise upon a mere perusal of the deed itself: generally the situation and ownership of the adjoining field is not disclosed; but the implication of grant arises *primâ facie* so soon as the facts are ascertained that the light required for the windows passed over the field, and that the grantor was owner of the field at the time of the grant. On these facts being known, and in the absence of any other special circumstances, the law imputes to the parties an intention that the easement of light should pass with the house by virtue of the grant. As I have recently stated with more fulness my opinion in regard to the subject of the implied grant in the

case of *Beddington v. Atlee*, 35 Ch. D. 317, I refrain from repeating what I there said. When all the surrounding circumstances which may legitimately be inquired into are made known, the result may be different — the *prima facie* implication or inference may be wholly displaced or considerably modified, as was held in the case of the *Birmingham, Dudley and District Banking Company v. Ross*, 38 Ch. D. 295. Where the implication arises, the easement which passes is an easement created *de novo*.

The principle of the decision in *Palmer v. Fletcher*, 1 Lev. 122, applies where the house and the land are sold and conveyed to two different grantees contemporaneously, as stated by the late Master of the Rolls (Sir G. Jessel), in his judgments in *Rigby v. Bennett*, 21 Ch. D. 559, 567, and *Allen v. Taylor*, 16 Ch. D. 355.

It was argued for the defendants that the principle applies only where the conveyance is by deed for valuable consideration. No authority was cited in support of this contention, which appears to me to be absolutely without foundation. The implied grant does not arise from the consideration for the grant, but from the grant and the surrounding circumstances, whether the intention of both the grantor and grantee under a voluntary deed is regarded, or the intention of the grantor alone is regarded, the result is the same. The intention to be imputed is that a house with lights shall pass.

This argument as to a voluntary conveyance was a step towards the defendants' main contention, that the principle does not apply to a will. In my opinion, it does apply to a will. No authority for this contention on the defendants' part was cited. All the reasoning on the subject appears to me to apply to a will where the intention of the testator alone is regarded. A will operates as a simultaneous conveyance of the house and the field to the two devisees. The question is covered, or all but covered, by two authorities cited for the plaintiffs. In *Barnes v. Loach*, 4 Q. B. D. 494, it was decided that the easement of light passed with the house without express words, the ground of the decision as stated in the judgment of the Court being, that if the owner of an estate has been in the habit of using *quasi* easements of an apparent and continuous character over the one part for the benefit of the other part of his property and aliens the *quasi* dominant part to one person, and the *quasi* servient to another, the respective alienees, in the absence of express stipulation, take the land burdened or benefited as the case may be, by the qualities which the previous owner had a right to attach to them. *Pearson v. Spencer*, 1 B. & S. 571; 3 B. & S. 761, was a case of a will. The testator had unity of possession of an estate which he divided by his will into two farms, devising one to the plaintiff and the other to the person under whom the defendant claimed. The way claimed by the defendant was the sole approach which had been used by the testator for the house and farm devised to the person through whom he claimed. It was decided that this way passed to the devisee of the defendant's farm, although there were no express words of gift

of the way. In delivering the judgment of the Court of Queen's Bench, Blackburn, J., after referring to the distinction between continuous and discontinuous easements, stated that *Pheysey v. Vicary*, 16 M. & W. 484, was an authority that the rule in this respect applied as well to a will as to a deed. In delivering the judgment of the Exchequer Chamber, Erle, J., stated that the judgment of the Court below was upheld on the construction and effect of the will taken in connection with the mode in which the premises were enjoyed at the time of the will. He said that the case fell under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that part of it involves a necessary dependence, in order to its enjoyment in the state it was when devised, upon the adjoining tenement. Upon the facts of that case, the Courts held that the way passed under the will. The ground of this decision applies to the present case. The house devised to the persons through whom the plaintiffs claim, contained windows so constructed as to involve a necessary dependence, in order to its enjoyment of light, upon the adjoining tenement. Light is an apparent continuous easement. Gale on Easements, 4th ed. p. 22. The case of *Polden v. Bastard*, Law Rep. 1 Q. B. 156, which related merely to the easement or quasi easement of a way which is a discontinuous easement, is not in point.

It was part of the argument for the defendants, that the basis of the doctrine laid down in *Palmer v. Fletcher*, 1 Lev. 122, and developed by subsequent authorities, was contract, or implied contract on the part of the person retaining or taking the field that he would not obstruct the lights, and that where there was no contract, the doctrine was inapplicable, and consequently that as there was no contract between a testator and his devisees, there was no ground for applying the doctrine to the case of a will. In support of this contention, certain expressions of the Lord Justices in their judgments in the case of the *Birmingham, Dudley and District Banking Company v. Ross*, 38 Ch. D. 295, were cited. It is unnecessary to deal with them at length. It is sufficient to say, that in my opinion the Lords Justices did not intend to alter the law as to implied grants, and that my decision in this case is not affected by anything which fell from them; and further, assuming that where there is a deed between parties, the doctrine ought to be explained theoretically as resting on contract as its basis. I see no difficulty in applying by analogy, in the case of a will, an obligation, or condition, or duty (whichever may be the right term) on the part of the devisee, or imposed on him by the testator, not to obstruct the access of light to the house devised to another. I prefer, however, to rest my judgment on the broad principles already stated.

UNION LIGHTERAGE CO. v. LONDON GRAVING DOCK CO.

COURT OF APPEAL. 1902.

[*Reported L. R. [1902] 2 Ch. 557.*]

APPEAL from the decision of Cozens-Hardy, J., [1901] 2 Ch. 300.

In 1860 Henry Green was the owner in fee simple of some riverside property at Blackwall. The western part was used as a wharf and shipbuilding yard, and was in the occupation of Messrs. Freeman as tenants. The eastern part was in the occupation of Green himself. In the same year he employed contractors to construct a graving dock on his own premises. It was constructed with timber sides, the underground supports or ties being placed on the eastern side of the boundary fence dividing the two portions of the property. Signs of weakness soon appeared, and, in order to make the dock secure, Green, in or about 1861, under some arrangement with his tenants, Messrs. Freeman, carried rods or ties through the boundary fence under the wharf to a distance of about 15 ft. 6 in., piles being placed there, and the rods or ties being fastened to the piles by nuts. The rods or ties were not visible under the wharf, nor, except to the extent which will be mentioned presently, were the piles or the nuts visible.

In 1877, Green having died, and both the properties being in hand, the devisees under his will conveyed the wharf premises to the plaintiffs, who carried on business there up to the commencement of the present action. The conveyance was in the ordinary form, and contained no express reservation of any right of support to the dock. In 1886 Green's devisees sold the dock premises to a company, which subsequently sold those premises to the defendants, who carried on business there up to the commencement of the action. This conveyance also was in common form, and was silent as to support. In 1892 the defendants concreted the bottom and a small part of the side of their dock; but with this exception the timber remained as before. In 1900 the plaintiffs, in the course of excavations with a view to improving their property, came across a number of rods and ties, which were those which had been placed there in 1861.

The question in the action was whether the defendants were entitled, as against the plaintiffs, to have their dock supported by means of the rods and ties.

The result of the evidence was thus stated by Cozens-Hardy, J., in his judgment : —

“Evidence has been adduced which satisfies me on several points. (1.) For a timber dock of this nature it was reasonably necessary to have underground rods and ties extending beyond the division fence between the two properties. This was proved by actual experience in

1860, and Mr. Jefferey, whose testimony was in no way shaken, states that the proper distance for safety, though it might vary slightly having regard to the nature of the soil, is for a dock of this depth thirty-three feet from the side, and this is about the distance adopted in 1861. (2.) If instead of a timber dock a concrete wall had been placed on the western side of the dock, it would not have been necessary to go beyond the boundary fence. (3.) The plaintiffs, when they purchased in 1877, in fact had no knowledge of the existence of the rods or ties under their land, and they were not aware of their existence until 1900. In saying this I refer to the directors and managers of the plaintiff company. (4.) There are now visible on the western side of the camp-sheathing, (See note [1901] 2 Ch. at p. 302), which holds up the side of the wharf, and a few inches above the slip, two nuts on the outside of piles. These are nuts and piles placed there in 1861. These nuts are not always visible, and are not of such a nature as to attract attention. In fact, the directors and the present manager had not noticed them until 1900. (5.) Although a skilled expert informed of the nature of the dock might have concluded that these nuts had to do with the support of the dock, no ordinary person conversant with riverside property would necessarily have arrived at this conclusion, for they might very probably have served to support the camp-sheathing and the wharf behind it. (6.) If the plaintiffs remove the ties it is probable that the dock side will give way."

The accuracy of this statement was not disputed.

COZENS-HARDY, J. held that when the wharf was conveyed to the plaintiffs there was no implied reservation of a right to support to the dock; that the support had been enjoyed *clam*, and that therefore no easement had been acquired by enjoyment; and that the plaintiffs were entitled to remove the rods and ties, although the result might be to cause the defendants' dock to collapse.

The defendants appealed.

Eve, K. C., and *Peterson*, K. C., for the defendants.

Hon. E. C. Macnaghten, K. C., and *Bryan Farrer*, for the plaintiffs.

VAUGHAN WILLIAMS, L. J. read the following judgment:¹

The question is, whether there has been gained, in respect of the dry dock of the defendants, the right to retain in or under the land of the plaintiffs certain rods or ties for the purpose of supporting or upholding the dry dock. The defendants claim the right in two ways: first, by way of implied reservation; secondly, by way of prescriptive easement. It is necessary, in order to judge of these claims, to state the history of the case. [His Lordship stated the facts, and continued:—]

I will now deal with the two legal questions in succession. First, was there, under these circumstances, any reservation by Green of the right of support by these tie-rods? Secondly, have Green or his suc-

¹ Those portions of the opinions which deal with the question of prescription are omitted.

cessors, by enjoyment since 1877, acquired, by prescription or presumed lost grant, any right to this support? Now, as to the question of reservation, *Wheeldon v. Burrows*, 12 Ch. D. 31, puts beyond doubt the general rule, that, if a grantor upon a conveyance of part of his property intends to reserve any right over the tenement granted, he must do so by an express reservation in the grant. So far *Wheeldon v. Burrows*, 12 Ch. D. 31, is a mere affirmation of the law as laid down by Lord Westbury in *Suffield v. Brown*, 4 D. J. & S. 185, 194, where he says: "But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him the grantor. Consider the easements as if they were rights, members or appurtenances of the adjoining tenement; they still admit of being aliened or released, and the absolute sale and grant of the land on or over which they are claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted which is separable from the tenement retained, and can be aliened or released by the owner." But both Thesiger, L. J., in *Wheeldon v. Burrows*, 12 Ch. D. 31, and Lord Westbury in *Suffield v. Brown*, 4 D. J. & S. 185, 194, recognize that there are some exceptions to this general rule. One exception is the case of necessity, of which a way of necessity is the most familiar instance. Another case of exception is the case of reciprocity, in which houses or other buildings are so constructed as to be mutually subservient to and dependent on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbor. This exception is recognized by Lord Westbury, 4 D. J. & S. 198, and by Thesiger, L. J., in *Wheeldon v. Burrows*, 12 Ch. D. 31, the judgment of Pollock, C. B., in *Richards v. Rose*, 9 Ex. 218, being generally the authority quoted for this exception of reciprocal or mutual easements. A third exception is where that which is claimed to be reserved is not an incorporeal easement, but part and parcel of a house or other building belonging to the conveying party, but not included in the conveyance. This exception is clearly recognized by James, L. J., in a short supplementary judgment which he delivered in *Wheeldon v. Burrows*, 12 Ch. D. 31. He said: "I only want to say something in addition, that in the case of *Nicholas v. Chamberlain*, Cro. Jac. 121, the Court seems to have really proceeded on the ground that it was not an incorporeal easement, but that the whole of the conduit through which the water ran was a corporeal part of the house, just as in any old city there are cellars projecting under other houses. They thought it was not merely the right to the passage of water, but that the conduit itself passed as part of the house, just like a flue passing through another man's house." Thesiger, L. J. also recognizes the same exception, but put *Nicholas v. Chamberlain*, Cro. Jac. 121, as an instance of an easement of necessity. Lord Westbury seems also to recognize this exception, for, speaking of *Nicholas v. Chamberlain*, Cro.

Jac. 121, he said, (4 D. J. & S. 197): it is "a decision which merely amounts to this, that the reservation, like the grant of a house, is the reservation or grant of it with its appurtenances." The present case is on the border line, but there is a great deal to be said in favor of the contention of the defendants, that these tie-rods fastened to the piles constitute a corporeal part of the dry dock, which was reserved, and, being essential to the maintenance of the dry dock, as it stood before and at the time of the conveyance, fall within Thesiger, L. J.'s view of this, which I have called the third exception, by being easements of necessity. On the whole, I think that the defendants are entitled to keep these tie-rods in the position in which they were originally placed, and always have been maintained, for the necessary purpose of the maintenance of the dry dock as built with its wooden sides. The tie-rods, in my opinion, are a corporeal part of the dry dock, just like the conduit or the cellar, or the flue mentioned by James, L. J. The tie-rods were, I think, reserved with the dry dock as appurtenances thereof, as Lord Westbury expresses it.

I have only to add that I do not assert that the authorities uniformly recognize the exceptions which I have specified to the general rule laid down by Lord Westbury in *Suffield v. Brown*, 4 D. J. & S. 185, 194, namely, the rule that it seems more reasonable and just to hold that, if the grantor intends to reserve any right over property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by a fiction of an implied reservation. For instance, there is this statement made by Lord Chelmsford, L. C., in *Crossley & Sons v. Lightowler*, L. R. 2 Ch. 478, 486: "It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for non constat that the grantor does not intend to relinquish it unless he shows the contrary by expressly reserving it." But against this dictum one has to put all those cases in which a reservation is implied for a right of support by way of reservation in favor of the grantor. These cases will be found set out in the judgment of Wood, V.-C., in the note to *Taylor v. Shafto*, [1867] 8 B. & S. 228, 252, which show generally that the implication in favor of an existing support is easily made on the ground of necessity. It cannot, as it seems to me, be said that the result of the judgments in either *Wheeldon v. Burrows*, 12 Ch. D. 31, or *Suffield v. Brown*, 4 D. J. & S. 185, is that it is impossible to presume a reservation from the state of things existing at the moment of severance of ownership of adjoining houses originally belonging to one owner. *Richards v. Rose*, 9 Ex. 218, was the case of two houses originally built together and belonging to the same owner, and there the Court presumed that, upon severance of ownership, there was a grant and reservation of a reciprocal right of support. It is, of course, true that the reciprocity is an important consideration in the inference, but the inference is not from user; it is based upon the fact of the state of

things existing at the moment of severance. It may be that the presumption will more readily arise where there is reciprocity than where there is no reciprocity, but the principle is the same in either case. In each case there is an exception from the rule that a man shall not derogate from his own express grant. The grantor is allowed by implication to derogate from his own express grant. Why? Because of the state of things at the moment of severance.

ROMER, L. J. read the following judgment: In my opinion this appeal fails. In the first place, I think that when the vendors, through whom the defendants claim, conveyed the plaintiffs' land to the plaintiffs, no reservation can be implied in favor of the vendors of a right of support in respect of the defendants' dock. When the conveyance is looked at, it appears to me that the ties supporting the dock, so far as they are on the plaintiffs' land, cannot be treated as part of the dock, and as not being conveyed. The land conveyed is clearly described, and, in my opinion, must cover the place occupied by the ties. Nor is this one of those cases of difficulty, referred to in *Wheeldon v. Burrows*, 12 Ch. D. 31, and other authorities, where at the date of conveyance reciprocal rights as between the property conveyed on the one hand and the property retained by the vendors on the other might be inferred. That being so, then, following *Wheeldon v. Burrows*, 12 Ch. D. 31, by which we are bound, it is clear that a reservation of a right of support in the present case could only be implied if it were one of necessity. Now, all I need say on this part of the case is that the facts do not lead me to the conclusion that there was any such necessity proved, or to be inferred, as would require, or would justify the Court in holding, that the reservation should be implied.

STIRLING, L. J. read his judgment as follows: The first point decided by Cozens-Hardy, J., was that, on the conveyance to the plaintiffs of the wharf in 1877, there was no implied reservation to the vendor of the easement now claimed by the defendants.

On this point the governing authority is *Wheeldon v. Burrows*, 12 Ch. D. 31, decided by James, Baggallay, and Thesiger, L. JJ., by the last of whom the judgment of the Court was delivered. In it two rules are laid down in the following terms (12 Ch. D. 49): "The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi-easements*), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second . . . is, that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways

of necessity." After reviewing various cases, the learned judge said (12 Ch. D. 58): "These cases in no way support the proposition for which the appellant in this case contends; but, on the contrary, support the propositions that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favor of the grantor of land."

The appellants did not dispute that there is no express reservation in the conveyance to the plaintiffs, but they contended that the easement claimed by the defendants is an "easement of necessity" within the recognized exception to the second rule. Now, in the passages cited the expressions "ways of necessity" and "easements of necessity" are used in contrast with the other expressions, "easements which are necessary to the reasonable enjoyment of the property granted," and "easements . . . necessary to the reasonable enjoyment of the property conveyed," and the word "necessity" in the former expressions has plainly a narrower meaning than the word "necessary" in the latter.

In my opinion an easement of necessity, such as is referred to, means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property. In *Wheeldon v. Burrows*, 12 Ch. D. 81, the lights which were the subject of decision were certainly reasonably necessary to the enjoyment of the property retained, which was a workshop, yet there was held to be no reservation of it. So here it may be that the tie-rods which pass through the plaintiffs' property are reasonably necessary to the enjoyment of the defendants' dock in its present condition; but the dock is capable of use without them, and I think that there cannot be implied any reservation in respect of them. Some other exceptions to the general rule are mentioned in *Wheeldon v. Burrows*, 12 Ch. D. 81, and in particular reciprocal easements, but it was not contended, and it does not appear to me that this case falls within any of them. Nor do I think that the tie-rods here form part of the corporeal structure of the dock which can be held not to have passed by the conveyance of the adjoining property.

JOHNSON v. JORDAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[*Reported 2 Met. 234.*]

TRESPASS for breaking and entering the plaintiff's close, subverting his soil, &c. The parties agreed the following facts: —

The plaintiff and defendant, at the time of the alleged trespass, severally owned in fee a messuage and land, adjoining each to the other, and fronting on Temple Street in Boston. In 1804, both said messuages and lands were owned by William Breed, who occupied one of them himself, and laid an artificial drain or conduit through the same into Ridgway's Lane; which drain was used by said Breed, and also, by his permission, by the tenants to whom he leased the other messuage, for the purpose of leading off waste water from the buildings on his said lands, into a common sewer of the city, situated in said lane. Said Breed died seised of said messuages, &c., in 1817, having devised the use thereof to his wife for life, and the remainder to Peter O. Thacher in fee. After said Breed's decease, his widow took possession of said messuages, &c., and held the same, occupying one of them, and leasing the other, until her death, April 10th, 1825, when said Thacher took possession thereof, and continued seised until the 13th of May, 1825, on which day he divided the same into several lots; the messuage of the defendant, in which a portion of the drain aforesaid was situated, being one, and the messuage of the plaintiff, in which another portion of said drain was situated, being the other; and on said day sold each of said lots at public auction. The messuage of the defendant was purchased, at said sale, by Enoch Kendall, and the messuage of the plaintiff by John P. Thorndike, as appears by said Thacher's deeds conveying the same, which are to be taken as part of this case. In November, 1825, said Thorndike conveyed his messuage to the plaintiff, and in July, 1826, said Kendall's executor conveyed his said messuage to the defendant.

After the said conveyances by Thacher, the waste water from the defendant's messuage ran in said drain through the plaintiff's land, into the common sewer, until May 1st, 1835. On that day, the plaintiff intentionally stopped up that part of the drain leading from the defendant's messuage, which was on the plaintiff's land; and in June following, as alleged in the plaintiff's declaration, the defendant entered on the plaintiff's land and opened the drain and removed the obstruction, doing no damage except such as was necessary to accomplish said act, and then closed the drain and restored the soil to its former condition.

The parties also agreed, that any further evidence, legally admissible, might be introduced by either party, and that the jury should

find, under the direction of the court, whether the defendant was or was not guilty, and if guilty, assess damages; and that either party might except to the ruling of the judge before whom the case should be tried, upon the foregoing facts agreed, and upon the further evidence that should be introduced.

The deed from Thacher to Kendall was of a lot of land, without mention of the drain, or of privileges and appurtenances. It was stated in said deed that Thorndike had the right to have a gutter on the side of the stable adjoining the lot conveyed to Kendall; and the deed was on condition that Kendall and his assigns should never open any windows or light on the side of any building that might be erected on the premises next to the mansion house sold to Thorndike.

At the trial before *Wilde, J.*, the foregoing statement of facts, with the papers therein referred to, were submitted to the court and jury. The defendant was also permitted to introduce evidence to prove that at the time of the aforesaid deeds of conveyance, made by Thacher, no drain could be made, with reasonable labor and expense, to carry off the waste water from the sink in the defendant's messuage, in any other direction than through said land of the plaintiff, and therefore that said drain was a drain of necessity.

The plaintiff was then permitted to introduce evidence to prove, that at the time aforesaid, and ever since, a drain could conveniently have been made, with reasonable labor and expense, from said sink, without going through the plaintiff's land as aforesaid.

The judge instructed the jury, that upon the facts agreed, if they were satisfied, from the other evidence introduced by the parties, that with reasonable labor and expense, a drain could be conveniently made, without going through the plaintiff's land, they should return a verdict for the plaintiff. To this instruction the defendant excepted.

A verdict was returned for the plaintiff. Judgment to be rendered thereon, if the instruction of the judge was correct; otherwise, the verdict to be set aside, and a new trial granted.

This case was argued at March Term, 1840.

B. R. Curtis, for the defendant.

Blair and E. D. Sohler, for the plaintiff.

SHAW, C. J. In an action of trespass *quare clausum fregit*, the defendant justifies under a claim of right to enter, and open and cleanse a drain, running from his own house into and through the defendant's premises, to a sewer in Ridgway's Lane. If he has such a right, it is a good justification; it being admitted that he entered for that purpose, and did no damage beyond what was necessary to accomplish it. But the plaintiff contends that the defendant had no right to continue the drain through his premises; and this is the question for the consideration of the court.

It is very clear that whilst both estates were held by the same owner, he had a right to carry his drain as he pleased, through any part of his own grounds; and so long as both tenements were owned

and occupied by the same person, no easement was created, or began to be created, in favor of one, and operating as a service or burden upon the other. So long, therefore, as such unity of title and of possession subsists, no right of easement is annexed to one tenement or charged on another; and it is quite immaterial how long the drain has subsisted during such ownership.

If such an owner will convey one of the tenements and retain the other, he may grant the right of drain, or not, to pass with the estate conveyed, or may reserve such a right over the estate conveyed, for the benefit of the one retained, as he pleases. It is matter of contract, and must depend entirely upon the construction of the conveyance. Supposing this to be clear, the question recurs, What construction will the law put upon a conveyance, where the intention of the parties in this respect is not expressed in terms?

In the first place, it is proper to distinguish an artificial gutter of this description, made for the purpose of draining, from a natural watercourse, the rights of parties to which depend upon a different principle. Every person, through whose land a natural watercourse runs, has a right, *publici juris*, to the benefit of it, as it passes through his land, to all the useful purposes to which it may be applied; and no proprietor of land, on the same watercourse, either above or below, has a right unreasonably to divert it from flowing into his premises, or obstruct it in passing from them, or to corrupt or destroy it. It is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as parcel. Use does not create it; and disuse cannot destroy or suspend it. Unity of possession and title in such land with the lands above it or below it does not extinguish or suspend it.

This case is also to be entirely distinguished from one wherein the declivity of the land and the relative position of the tenements are such, that a drain cannot be formed for the benefit of one, without passing through the other. Such a case might stand upon a different ground. But in the present case, it was found by the jury, that a drain could be conveniently made, with reasonable labor and expense, from the defendant's house, without going through the plaintiff's land.

There are some general and well-settled rules of construction of conveyances, which tend in some degree to settle the question. The language of the deed is the language of the grantor; he selects the terms, and it being supposed that he will insert all that has been agreed upon beneficial to himself, and will be less careful to state fully all which is beneficial to the grantee, the language is to be construed most strongly against the grantor.

Another well-settled rule of construction is, that a grant of any principal thing shall be taken to carry with it all which is necessary to the beneficial enjoyment of the thing granted, and which it is in the power of the grantor to convey. When therefore a party has erected a mill on his own land, and cut an artificial canal for a raceway, through his

own land, and then sells the mill, without the land through which such artificial raceway passes, the right to use such raceway through the grantor's land shall pass as a privilege annexed *de facto* to the mill, and necessary to its beneficial use. *New Ipswich Factory v. Batchelder*, 8 N. H. 190.

Under these rules, it might perhaps be held, that if a man, owning two tenements, has built a house on one, and annexed thereto a drain, passing through the other, if he sell and convey the house with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance, and pass with it; and because such construction would be most beneficial to the grantee: Whereas, if he were to sell and convey the lower tenement, still owning the upper, it might reasonably be considered that as the right of drainage was not reserved in terms, when it naturally would be, if so intended, it could not be claimed by the grantor. The grantee of the lower tenement, taking the language of the deed most strongly in his own favor and against the grantor, might reasonably claim to hold his granted estate free of the incumbrance. *Leonard v. White*, 7 Mass. 8; *Grant v. Chase*, 17 Mass. 443.

But neither of these rules will apply to the present case, because it appears by the deeds themselves, as well as by the other evidence in the case, that the two conveyances from the owner of the whole, under which the parties claim, were simultaneous. It is therefore much more like a partition between tenants in common, where each party takes his estate with the rights, privileges, and incidents inherently attached to it, than like the case of grantor and grantee, where the grantor conveys a part of his land, by metes and bounds, and retains another part to his own use, and where the question is, upon the terms of the deed, whether an easement for drainage has been granted with the estate conveyed over that retained, or reserved over that conveyed, for the benefit of that retained.

In the present case, the estates were both owned and occupied by Mr. Thacher until the sale made to Mr. Thorndike and Mr. Kendall, under whom the plaintiff and defendant respectively derive title. Both of these deeds bear date the same day. Each refers to the estate described, as this day sold to the other. Both deeds must be taken and construed together. In the deed to Thorndike, an easement for a gutter was created; and in the deed to Kendall, the same is charged as a perpetual servitude, in favor of Thorndike and his heirs. The conveyance to Kendall was made upon an onerous condition never to open windows in any building to be erected on the premises, on the side next to the dwelling-house conveyed to Thorndike; a condition manifestly designed for the benefit of the estate conveyed to the latter; and in the deed to Thorndike, this restriction upon the estate conveyed to Kendall is recited; intended, no doubt, to show that the estate to Thorndike and his assigns, was thereby enhanced in value. The well-known maxim of construction, and a very sound one, is, *Expressio*

unius exclusio est alterius. Here was a division of these two tenements intimately connected with each other, with detailed provisions in respect of the rights which each should have in the other, and the duties to which each should be subject in favor of the other. If it was intended that one should have a perpetual right of drainage through the other, with a right of entry at all times to repair and relay such drain, especially where it is found not to be necessary to the enjoyment of the estate granted, it seems reasonable to suppose that it would have been expressed. As no such right was expressed, we are of opinion that it was not intended to be granted; and as it was not necessary to the enjoyment of the estate, and had not been *de facto* annexed, so as to pass by general words as parcel of the estate, it did not pass to the defendant's grantor by force of the deed. As about ten years only elapsed after these conveyances, and the consequent division of the two tenements between different proprietors, before the grievance complained of, it is very clear that the defendant derived no right to the easement by actual use and enjoyment. Such a right in the estate of another can be created by actual use, only when such use has been adverse, peaceable, and uninterrupted, and continued for a period of twenty years.

*Judgment on the verdict for the plaintiff.*¹

LAMPMAN v. MILKS.

COURT OF APPEALS OF NEW YORK. 1860.

[Reported 21 N. Y. 505.]

APPEAL from the Supreme Court. Action for changing the course of a stream, and flooding the plaintiff's land. Upon the trial, at the Otsego Circuit, before Mr. Justice *Crippen*, a jury having been waived, these facts appeared: On the 27th March, 1850, Ovid Chesebro owned forty acres of land on Elk Creek, through which there was a small brook running. In its natural course it would have run over half an acre of low ground, which Chesebro on that day conveyed to the plaintiff for a building lot, and upon which the plaintiff immediately thereafter erected a house and barn. Some ten years previously, the owner of the forty acres had diverted the stream through an artificial channel, carrying it into Elk Creek in such a manner as not to flow over the plaintiff's land. On the 1st of April, 1850, Chesebro conveyed the

¹ See *Collier v. Pierce*, 7 Gray, 18 (Mass., 1856); *Randall v. McLaughlin*, 10 All. 366 (Mass., 1865); *Warren v. Blake*, 54 Me. 276 (1866); *Buss v. Dyer*, 125 Mass. 287 (1878); *Mitchell v. Seipel*, 58 Md. 251 (1879); *Whyte v. Builders' League of New York*, 164 N. Y. 429 (1900). Cf. *Burwell v. Hobson*, 12 Grat. 322 (Va., 1855); *Goodall v. Godfrey*, 53 Vt. 219 (1880); *Rightsell v. Hale*, 90 Tenn. 556 (1891); *Baker v. Rice*, 56 Ohio St. 468 (1897); *Larsen v. Peterson*, 53 N. J. Eq. 88 (1894), *post*.

residue of the forty acres to the grantor of the defendant. In 1854 the defendant dammed up the entrance to the artificial channel, so as to cause the stream to run in its original bed and to overflow the plaintiff's yard, which was the injury complained of. The judge ordered judgment for the defendant, which having been affirmed at General Term in the Sixth District, the plaintiff appealed to this court. The cause was submitted on printed arguments.

E. E. Ferry, for the appellant.

B. J. Scofield, for the respondent.

SELDEN, J. Although this is an action of a very trivial nature, in respect to the amount which it involves, it nevertheless embraces principles of very considerable importance, and should, therefore, be carefully considered. It was clearly established upon the trial that, at the time when the plaintiff purchased and took a conveyance from Chesebro, the stream in question, instead of running in its original channel, through the entire length and across the south line of the plaintiff's lot, had been turned through an artificial channel across the north line on to the other portions of the forty acres, and thence into Elk Creek; thus leaving the whole of the southern portion of the plaintiff's lot, upon which he subsequently built his house and barn, dry and free from the encumbrance of the stream, which had originally spread over a considerable portion of the lot. It did not distinctly appear how long the stream had run in this artificial channel prior to the conveyance of the lot by Chesebro, nor do I deem this of any importance. It was several months, at least. The question is, whether, after conveying this lot and its appurtenances to the plaintiff, with the stream then running in the artificial channel on to adjoining premises of his own, either he or his grantees would have a right afterwards to obstruct this channel, and turn the water back through its original course across the entire lot.

The owner of real estate has, during his ownership, entire dominion and control over its various natural qualities, and may dispose of and arrange them at will. He may alter the natural distribution of those qualities, so as essentially to change the relative value of the different parts; and may, in a great variety of ways, make one portion of the premises subservient to another. The precise question in this case is, whether an owner, who, by such an artificial arrangement of the material properties of his estate, has added to the advantages and enhanced the value of one portion, can, after selling that portion with those advantages openly and visibly attached, voluntarily break up the arrangement and thus destroy or materially diminish the value of the portion sold.

The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by

which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if, instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts.

These principles are so obviously just, that we might be warranted in applying them to the present case for that reason alone. But they are also sustained by ample authority. The oldest case on the subject appears to be that of *Coppy*, 11 Henry VII., 25, cited from the Year-Books by Gale and Whatly, in their work on Easements, page 41. That was an action on the case for stopping a gutter running from the building of the plaintiff over the adjoining building of the defendant. The plea was, that, within the time of memory, both buildings had belonged to the same individual, who had sold one of them to the plaintiff and the other to the defendant; and that the easement, if it ever existed, was extinguished by this unity of ownership. But the court held this to be no defence. It was, however, conceded that if the owner of both tenements, before selling either, had destroyed the gutter, and then sold, the gutter could not have been restored. This case was identical in principle with the present, and fully sustains what has been here said. It shows that, if the owner of an entire property wishes to put an end to a burden, which has been imposed upon one portion for the benefit of another, he must do so before he sells the portion benefited.

But the leading case, and the one which has always been regarded as settling the law upon this subject, is *Nicholas v. Chamberlain*, Cro. Jac. 121, in which, to use the language of Croke, "It was held by all the court, upon demurrer, that, if one erect a house, and build a conduit thereto, in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and quasi appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require." The authority of this case has never been shaken, but, on the contrary, it has been referred to with approbation, in all the subsequent cases in which this question has been involved.

The same doctrine was laid down in the case of *Robbins v. Barnes*, Hob. 181. It was there held, that when one of two adjoining houses was originally built in such a manner that one overhung a portion of the other, although this overhanging was originally wrongful, yet if both houses should come afterwards to be owned by one individual, and he should sell them to different persons without alteration, the purchaser of the overhanging house would thereby acquire a right to maintain his house in that condition, and when it decayed to pull it down and build another of the same description. But the court at the same time held, that although the overhanging was at first rightful, yet if one, owning both houses at the same time, had removed the overhanging portion, and then sold to different persons, the overhanging could never be renewed; because the houses, as the court say, "must be taken as they were at the time of the conveyance." The whole principle is contained in the few words here quoted.

There are several American cases holding the same doctrine. The first to which I shall refer is that of *New Ipswich Factory v. Batchelder*, 3 N. H. 190. A tract of land had been conveyed by metes and bounds, having upon it a mill; and, at the time of the conveyance, there was a raceway to conduct the water from the mill, running along the side of the natural stream beyond the bounds of the land granted into other lands of the grantor, and then discharging the water into the natural stream. The court held, that a right to have the water flow off uninterruptedly, through the whole extent of the raceway, passed as appurtenant to the mill. It has been suggested that the decision in this case was produced by the peculiar phraseology of the deed, which mentioned "water privileges and all other privileges annexed to or belonging to said premises;" but no stress is laid upon this language by the court in deciding the case. On the contrary, it is put expressly upon the principle of the case of *Nicholas v. Chamberlain*. The Chief Justice quotes that case at length, and then says: "The rule here laid down seems to be founded in sound reason and good sense, and to apply, in all its force, to the case now before us."

Another case, equally in point, is that of *United States v. Appleton*, 1 Sumner, 492. A block of buildings was erected in Boston, in 1808, consisting of a central building and two wings, with a piazza in front of the central building, and side doors in the wings, which opened on and swung over the piazza, the upper parts of which were used as windows. The wings were conveyed in 1811 to different parties, without mentioning the side doors, and in 1816 the central building was sold to the United States. It was held that the use of the side doors and windows passed as appurtenances, without any reference to the length of time during which they had been used. In this case, also, the case of *Nicholas v. Chamberlain* was referred to and relied upon by Judge Story. The same judge has also fully recognized the doctrine, in the previous case of *Hazard v. Robinson*, 3 Mason, 272.

I shall not cite that large class of cases in which various privileges

and easements have been held to pass as appurtenances, where the conveyance uses some comprehensive word, such as manor, messuage, farm, mill, and the like, as descriptive of the whole subject of the grant, because those cases are explained upon the ground that all the privileges in use, as parts of the thing conveyed, are virtually included in the general designation of the thing as a whole. This criticism, however, has no application to the cases already cited, nor to that to which I will next refer, namely, *Thayer v. Payne*, 2 Cush. 327. The plaintiff and defendant were the owners and occupants of adjoining lots of land, the defendant having derived his title from the plaintiff. At the time of the conveyance from the plaintiff to the defendant, there was a drain from the defendant's cellar leading through the plaintiff's premises to an outlet beyond. This drain was not mentioned in the deed. The drain being out of repair, the defendant entered upon the premises of the plaintiff for the purpose of opening it; and for this entry the action was brought. It was held that the defendant had a right to maintain the drain, and to enter upon the plaintiff's premises for the purpose of repairing it, notwithstanding the deed contained the following clause: "To have and to hold the aforegranted premises, with the privileges and appurtenances thereto belonging, at the time of the purchase thereof by the said Thayer and French;" and, notwithstanding it appeared that the drain had no existence at the time referred to in this clause, it having been constructed afterwards, but before the conveyance to the defendant. The decision was put upon the ground that, as the plaintiff owned both lots at the time of his conveyance to the defendant, and as the drain was then in existence and use, it passed as an appurtenance without being mentioned, and without even the use of the word appurtenances; and, hence, it could not be affected by the clause in the deed. It is hardly possible to conceive of a stronger case than this, for the support of the principles here advanced.

There are one or two other classes of cases, which, by the distinctions they involve, present the principles upon which this case depends in so clear a light, that it may be well to advert to them. One of these classes comprises those cases which relate to the obstruction of windows. It is well settled, that, as a general rule, if the owner of a building has windows overlooking an adjoining lot, the owner of the latter may build directly in front of the windows so as entirely to obstruct their light, unless they are shown to be *ancient*. If, however, both proprietors obtained their title from a common source, the same grantor having conveyed the tenement with the windows to one, and the ground overlooked to another, the windows cannot be obstructed; and the reason is, that the relative qualities of the two tenements must be considered as fixed at the time of their severance, each retains, as between it and the other, the properties then visibly attached to it, and neither party has a right afterwards to change them. These principles are distinctly stated in a very early case, viz., *Cox v. Matthews*, Ventris, 237, which was an action for stopping lights. Lord Hale laid down the

rule in this case as follows: "That if a man builds a house upon his own ground, he that hath the contiguous ground may build upon it also, though he doth thereby stop the lights of the other house; for, *Cujus est solum, ejus est usque ad cœlum*; and this holds, unless there be a custom to the contrary, as in London. But in an action for stopping of his light, a man need not declare of an ancient house; for if a man should build an house on his own ground, and then grant the house to A, and grant certain land adjoining to B, B could not build to the stopping of its lights in that case."

The first portion of the rule here laid down, although well established in England, has not been adopted in this State; but, on the contrary, was expressly rejected, in the case of *Parker v. Foote*, 19 Wend. 309, for the reasons there given. This decision, however, has no bearing upon the doctrine, that, if a man builds a house, at the same time owning both the site of the house and the adjoining land, and then sells the house, neither he nor his grantees can afterwards build upon the vacant ground so as to obstruct the windows of the house.

I will refer to one or two of the cases on this latter branch of the rule, laid down by Lord Hale in *Cox v. Matthews*, for the purpose of showing that the principle upon which they rest is identical with that involved in the present case.

Palmer v. Fletcher, 1 Lev. 122; 1 Sid. 167, s. c., was an action for stopping lights. It appeared that the owner of land erected a house upon it, and, after selling the house to one, sold the vacant ground to another, who obstructed the windows of the house. The court held that neither the builder of the house himself, nor any one claiming under him, had a right to build upon the vacant ground so as to interfere with the existing windows, giving, as a reason, that the grantor of the house could not derogate from his own grant. Kelynge, J., however, said, that if the vacant ground had been sold first, and the house afterwards, the purchaser of the ground might then have stopped the lights; but Twisden, J., denied this, saying that, "whether the land be sold first or afterwards, the vendor of the land cannot stop the lights of the house, in the hands of the vendor or his assignees; and cites a case to be so adjudged."

If we consider the reason of the rule, we shall see at once that, in this conflict of opinion, Mr. Justice Twisden was clearly right. The principle is that so concisely stated in *Robbins v. Barnes* (*supra*), that, upon the severance of two tenements belonging to the same owner, by the conveyance of one or both, they must be taken as they were at the time of the conveyance. If, therefore, the owner retains the tenement benefited, and sells that upon which the burden has been imposed, the purchaser takes the latter with the burden or servitude annexed. The time during which the lights have been enjoyed, has nothing to do with the rule in these cases. Whether they have existed for twenty years, or for a single day, they are equally protected. The doctrine has been adhered to in all the later English cases. *Riviere v. Bower*, Ry. &

Mo. 24; *Compton v. Richards*, 1 Price, 27; *Coutts v. Graham*, 1 Mo. & Mal. 396.

I will refer, upon this point, to but a single American case, viz., *Story v. Odin*, 12 Mass. 157. This was an action for stopping lights not alleged to be *ancient*. The essential facts of the case, and the point of the decision, are very clearly stated in the following extract from the opinion of Jackson, J.: "The town of Boston, in the year 1795, owned the two pieces of land now owned by the plaintiff and defendant. They then sold to the plaintiff the piece now owned by him. This piece then had upon it a building, like that afterwards erected by the plaintiff upon the same foundations, and with doors and windows corresponding to those in the new building. *This grant being without any exception, or any reservation of a right to build upon the adjoining ground, or to stop the lights in the building which they sold*, it is clear that the grantors themselves could not afterwards lawfully stop those lights, and thus defeat or impair their own grant. As they could not do this themselves, so neither could they convey a right to do it to a stranger. No lapse of time was necessary to confirm this right to the plaintiff."

This case is important, because it expressly shows that the court considered the question, whether it is incumbent upon the purchaser to secure, by covenant, existing benefits not naturally belonging to the tenement purchased, but previously conferred upon it at the expense of other lands of the grantor; or whether the grantor must himself guard against transferring the right to such benefits. The conclusion, as we have seen, was, that such benefits remain attached to the tenement conveyed, unless the right to subvert them is expressly reserved.

There is still another class of cases which illustrate and support the same doctrine. If a man has a house standing directly upon the line of his lot, he has, in general, no remedy against the owner of the adjoining ground, who, by excavating upon his own land, has weakened the foundation of the house so as to cause it to fall. So, also, if the house is partially supported by a building upon the adjoining lot, the owner of the latter building may pull it down, although, in consequence of its removal, the house should fall. If, however, the house and the adjoining premises have both belonged to the same individual at any time subsequent to the building of the house, the owner of the house would, upon the severance of the two tenements, have acquired a right to all the support at that time afforded by the adjoining premises. The cases on this subject are numerous, but I will refer to two only.

Peyton v. The Mayor, &c., of London, 9 Barn. & Cres. 725, was an action on the case to recover damages for pulling down an adjoining house, in consequence of which the plaintiff's house was impaired and partly fell. It was held, that, as the plaintiff had not alleged or proved any right to have his house supported by the defendant's, he was bound to protect himself by shoring. It was, however, impliedly conceded, that, if the houses had been built or owned by the same person, and afterwards passed into different hands, such a right would have existed.

Lord Tenterden, in giving his reasons for the decision, says: "It did not appear whether the two houses had been erected at the same time, or at different times: from their construction, it seems likely that they were built at or about the same time. The freehold was then in different hands: and as the governors of the hospital (the defendants) are not likely to have bought or sold in modern times, it is probable that the freehold was also *in different hands* when the houses were built." This seems plainly to imply, that, if the houses had been in the same hands when built, an easement, or right to support, would have existed.

Chancellor Walworth, in the case of *Lasala v. Holbrook*, 4 Paige, 169, adverts to the same distinction. The object of the action there was to obtain an injunction, restraining the defendants from excavating upon their own lot in Ann Street, in the city of New York, so as to endanger the walls of a church standing upon the adjoining lot. The object of the defendants, in excavating, was to erect a building upon their lot. It was held, that, if a person, in excavating for the improvement of his own lot, digs so near the foundation of a house on an adjoining lot as to cause it to settle or fall, he will not be liable for the injury if he has exercised ordinary care and skill in making the excavation. But the Chancellor said: "There is another class of cases, however, where the owner of the building on the adjacent lot is entitled to full protection against the consequences of any new excavation, or alteration of the premises intended to be improved, by which he may be in any way prejudiced. These are ancient buildings, or those which have been erected upon ancient foundations, and which, by prescription, are entitled to the special privilege of being exempted from the consequences of the spirit of reform operating upon the owners of the adjoining lots; *and also those which have been granted in their present situation by the owners of such adjacent lots, or by those under whom they have derived their title.*" It will be seen, therefore, that there is an entire concurrence in principle among all the various classes of cases to which I have referred.

There is one other distinction, having a direct bearing upon this question, not yet adverted to. It is not every species of easement which passes as a matter of course by the conveyance of one of two tenements, or part of a single tenement, by the owner of both or the whole. Easements, or servitudes, are divided by the civil code of France into continuous and discontinuous. Continuous are defined to be those, of which the enjoyment is, or may be, continual, without the necessity of any actual interference by man; as a water-spout, or right to light or air. Discontinuous are those, the enjoyment of which can be had only by the interference of man; as rights of way, or a right to draw water.

Servitudes are also divided, by the same code, into "apparent" and "non-apparent." The analogy between the common law and the French code, in this respect, would seem to indicate, as suggested by Messrs. Gale and Whatly, a common origin. The substance of those

divisions may be distinctly traced in the common law cases; and it will be found, that those easements which, according to this classification, are termed discontinuous, pass upon a severance of tenements by the owner only when they are absolutely necessary to the enjoyment of the property conveyed. Gale and Whately, after stating the grounds upon which easements are held to pass in such cases, say: "This reasoning applies to those easements only which are attended by some alteration which is, in its nature, *obvious and permanent*; or, in technical language, to those easements only which are apparent and continuous; understanding, by apparent signs, not those which must *necessarily* be seen, but those which *may be* seen or known, on a careful inspection by a person ordinarily conversant with the subject." Gale and Whately on Easements, page 40.

This distinction may serve to explain a few of the cases, particularly in Massachusetts, which might otherwise seem to be in conflict with the numerous cases which have been cited. In the present case, the servitude was not only permanent, but perfectly obvious and apparent, at the time of the conveyance to the plaintiff, and must, therefore, according to all the authorities, have passed by the deed.

The judgment should, therefore, be reversed, and there should be a new trial, with costs to abide the event.

All the judges concurring,

*Judgment reversed, and new trial ordered.*¹

CARBREY v. WILLIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1868.

[Reported 7 Allen, 364.]

CONTRACT to recover damages for the breach of the covenants of warranty and against encumbrances in a deed of land on Atkinson Street, in Boston, bounded in part as follows: "Southerly on land now or late of Benjamin Gould, there measuring sixteen feet and six inches; westerly again on the same, there measuring sixteen feet; and southerly on land now or late of the heirs of Cowell, there measuring forty-eight feet, more or less, to said Atkinson Street, or however otherwise bounded or described." The declaration alleged that the premises conveyed were subject to a right of drainage across the same, and also to the right to have the eaves on the estate on the southerly side thereof overhang said land, and the water drip therefrom.²

¹ As to whether the servient tenement continues bound in the hands of a subsequent purchaser by an easement created by implication, see *Ingals v. Plamondon*, 75 Ill. 118 (1874); *Robinson v. Clapp*, 65 Conn. 865 (1895); *Edwards v. Haeger*, 180 Ill. 99 (1899).

² The part of the case which concerns the right to have the eaves is omitted.

At the trial in the Superior Court, before *Ames, J.*, the execution of the deed by the defendant, which was dated May 1, 1848, was admitted. It appeared in evidence that in 1812, and for many years before that time, the granted premises, and also an estate on High Street, in favor of which the alleged right of drainage was claimed, belonged to George Blanchard; and that in 1812 Blanchard conveyed to Rebecca Richardson the estate described in said deed, by a deed of mortgage in the common form, with general covenants of warranty and freedom from encumbrances, to secure the payment of \$5000 in two years with interest. The title under this mortgage and also the equity of redemption, which was taken on execution, became vested in the defendant as early as 1821. The title to the estate on High Street passed from Blanchard in 1815, and is now held by devisees of William Phillips, who acquired the title thereto in 1823.

The plaintiff introduced evidence tending to show that there was no trouble with the drain from the estate on High Street until 1857, when it became choked up, and flooded the cellar of the house from which it led, and a mason was employed to make examinations, and it was found that it passed through the plaintiff's land; and that the house upon the estate on High Street was an old house prior to the year 1812. The plaintiff testified that he had no knowledge of the existence of the drain until it was opened by the mason. There was no evidence when or under what circumstances the drain was originally constructed, except that the mason testified that it appeared as if it was built when the house drained by it was built. There was some conflict of testimony as to the practicability of draining from the cellar of the High Street estate into the High Street sewer.

"The judge ruled that, there being no evidence as to the precise time when the drain was constructed, and it being assumed that it was an ancient one, the burden was upon the plaintiff to show that the owners of the High Street estate had acquired a right to use it, and that, so long as both estates were owned in the same right by the same person, the use of the drain had nothing of the nature or character of an easement; that, after the ownership was severed and the two estates had passed into different hands, the fact that the High Street estate continued to be drained across the plaintiff's estate, without any evidence that the plaintiff or those under whom he claims had any knowledge or notice whatsoever of the fact, would not amount to such an adverse use or such a claim of right as by mere use and lapse of time to create a right of easement, and that such use, not being open and notorious, would not establish the right, unless shown expressly to have come to the knowledge of the owners of the plaintiff's estate.

"The judge also ruled that, although a drain attached to and used by the High Street estate would generally be held to be appurtenant thereto and to pass by any deed or conveyance thereof, independently of any prescriptive title or right acquired by adverse use, yet under the circumstances of this case, the drain being assumed by both parties to

have been in use previously to the year 1812, and the owner at that time, Blanchard, having conveyed by mortgage the alleged servient estate to Richardson, with general covenants of warranty and freedom from encumbrances, the defendant, under the title deeds put in by him, making his title in part under the conveyance to said Richardson, held his estate in 1821 and afterwards relieved of this encumbrance; and that the owners of the High Street estate, claiming under said Blanchard, are estopped and barred, by the previous deed from said Blanchard of the other estate, from claiming the drain in controversy as appurtenant to their estate."

A verdict was rendered for the defendant, by the direction of the judge, and the facts and evidence were reported for the revision of this court.

D. Thaxter and *F. Bartlett*, for the plaintiff.

C. M. Ellis and *E. Pearson*, for the defendant.

HOAR, J. The first ruling made by the judge who presided at the trial was entirely correct. While both estates were owned by Blanchard, no easement could be created by any use of the drain for the benefit of one of them. And after the ownership was severed, the continuance of the drain would have no tendency to prove the acquisition of an easement by adverse enjoyment, because the use was not open or visible, or known to the owners of the estate upon which it would be imposed.

In the next place, it is clear that the conveyance by the mortgage to Rebecca Richardson in 1812, with full covenants of warranty, would estop the grantor and those claiming under a title subsequently derived from him, from claiming any interest in the mortgaged premises. When the mortgage was foreclosed or merged in the equity of redemption, the title of the mortgagee became absolute and indefeasible to all the premises included in the mortgage deed at the time of its execution.

The only question, then, which arises on this part of the case is, whether anything was excepted from the grant to Richardson, as forming a part of the High Street estate which was retained by the grantor. The whole doctrine on this subject was reviewed and carefully stated in the case of *Johnson v. Jordan*, 2 Met. 234. The court in that case intimate the opinion "that if a man, owning two tenements, has built a house on one, and annexed thereto a drain passing through the other, if he sell and convey the house with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance, and pass with it; and because such construction would be most beneficial to the grantee; whereas, if he were to sell and convey the lower tenement, still owning the upper, it might reasonably be considered that as the right of drainage was not reserved in terms, when it naturally would be if so intended, it could not be claimed by the grantor. The grantee of the lower tenement, taking the language of the deed most strongly in his own favor and against the grantor, might reasonably

claim to hold his granted estate free of the encumbrance." The grants were in that case simultaneous. But where, as in the case at bar, the grant of the lower estate precedes that of the other, we think the true rule of construction is this: that no easement can be taken as reserved by implication, unless it is *de facto* annexed and in use at the time of the grant, and is necessary to the enjoyment of the estate which the grantor retains. And this necessity cannot be deemed to exist, if a similar privilege can be secured by reasonable trouble and expense.

The rule in respect to easements which pass by implication has been held with some strictness in this Commonwealth, even in the case where a grantee claims them as against his grantor, or where the question arises between grantees under conveyances made at the same time, or in cases of partition. Thus in *Grant v. Chase*, 17 Mass. 448, it was said that easements which are not named would not pass by a grant, "unless they were either parcel of the premises that were expressly conveyed, or necessarily annexed and appendant to them." In *Nichols v. Luce*, 24 Pick. 102, it was held that "convenience, even great convenience, is not sufficient" to make a right of way pass as appurtenant. To the same effect is *Gayetty v. Bethune*, 14 Mass. 49; and a similar conclusion is reached upon full discussion, by Mr. Justice Fletcher, in *Thayer v. Payne*, 2 Cush. 327.

In some recent cases in England a different doctrine seems to have prevailed; and even in the case of a grant of a part of an estate, an easement has been held to be reserved to the grantor as parcel of the remainder, without an express reservation, if it were *de facto* used in connection with it at the time of the grant, and were necessary to its enjoyment in the condition in which the estate then was. *Pyer v. Carter*, 1 Hurlst. & Norm. 916; *Ewart v. Cochrane*, 7 Jur. N. S. 925; *Hall v. Lund*, Law Journ. Rep. May, 1868, page 118. In *Pyer v. Carter* it was held that it would make no difference in the application of the principle, if a new drain could be constructed on the plaintiff's own land at a trifling expense. The terms of the deed are not given in the report of the case, and the decision may perhaps be supported on the ground that the conveyance was of part of a house, having obvious existing relations to and dependencies upon the other part of the building. Thus it is a familiar principle that in a grant of a messuage, a farm, a manor, or a mill, many things will pass which have been used with the principal thing, as parcel of the granted premises, which would not pass under the grant of a piece of land by metes and bounds. In such cases it is only a question of the construction of terms of description.

But where there is a grant of land by metes and bounds, without express reservation, and with full covenants of warranty against encumbrances, we think there is no just reason for holding that there can be any reservation by implication, unless the easement is strictly one of necessity. Where the easement is only one of existing use and great convenience, but for which a substitute can be furnished by reasonable

labor and expense, the grantor may certainly cut himself off from it by his deed, if such is the intention of the parties. And it is difficult to see how such an intention could be more clearly and distinctly intimated than by such a deed and warranty.

The presiding judge ruled, as a matter of law, that no right of drainage was reserved under the deed to Richardson in 1812, and we have some doubt whether the evidence reported would have supported a verdict to the contrary. But as the case must go to a new trial upon another ground, and there was some evidence of the necessity of the drain, and the nature and extent of the necessity do not appear to have been distinctly presented as a subject of ruling by the court, it will be proper that it should be submitted to the jury under suitable instructions upon this point.¹

MULLEN v. STRICKER.

SUPREME COURT OF OHIO. 1869.

[Reported 19 Ohio St. 135.]

ERROR to the Superior Court of Cincinnati.

The plaintiff and defendant are the owners of adjacent lots, Nos. 51 and 53 Broadway, Cincinnati, on each of which is a four-story brick house. The house on No. 51 covers the entire lot, the centre of its south wall being the dividing line between it and No. 53. Between this wall and the house upon No. 53 is an area or space-way, some four or five feet wide, extending part the length of the wall. Several of the windows in the house on lot 51 open into and are lighted from this area. For many years prior to April 24, 1866, both lots, with the houses thereon, had been owned by Clement Deitrich, and occupied and used by him, in their present condition. On the 24th of April, 1866, Deitrich, in pursuance of a public notice, offered the lots for sale at auction, when lot 51 was struck off to the defendant in error, Francis Stricker, and lot 53 to another person. Stricker complied with the terms of sale, and, on the 30th of April, his lot was conveyed to him by Deitrich. The other purchaser failed to comply with the terms of sale; but before the execution of the deed to Stricker, the plaintiff in error, Mrs. Mullen, purchased lot 53, and on the first day of May, one day after the execution of Stricker's deed, she received her deed from Deitrich for lot 53. Both deeds contained covenants of general warranty, and against encumbrances, and in both, the centre of the partition wall aforesaid is described as being the boundary line between the lots. It is admitted that a substitute for the windows opening into the area

¹ See *Dolliff v. Boston & Maine R. R.*, 68 Me. 173 (1878); *Burns v. Gallagher*, 62 Md. 462 (1884); *Crosland v. Rogers*, 32 So. Car. 130 (1889); *Wells v. Garbutt*, 132 N. Y. 430 (1892); *Tooth v. Bryce*, 60 N. J. Eq. 589 (1893), *post*; *Walker v. Clifford*, 123 Ala. 67 (1900). Cf. *Dunklee v. Wilton R. R. Co.*, 24 N. H. 439 (1852).

can be had, by which air and light will be provided from above, at an expense of from \$300 to \$1500.

Shortly after the execution of these deeds, Mrs. Mullen being about to obstruct the windows aforesaid, by building upon and filling up the area from which they were so lighted, Stricker brought his action against her in the Superior Court of Cincinnati, to enjoin her from so doing. The cause was reserved by that court for hearing in General Term, where a perpetual injunction was awarded; and Mrs. Mullen now seeks to reverse the judgment of the Superior Court by her petition in error here.

Hoadly, Jackson, and Johnson, and J. and R. A. Johnston, for plaintiff in error.

Stallo and Kittredge, for defendant in error.

WELCH, J. The whole case is a question of the construction of Deitrich's deed to Stricker. If Stricker has any right to the easement in controversy, he acquired it by that deed. That the deed does not expressly grant the easement, is admitted. Its language is unequivocal, making the "partition wall" the dividing line between the two lots. Nor is it claimed that the easement had attached or become appurtenant to lot 51, by user or prescription. On the contrary, it is conceded, and so we understand the law to be in Ohio (*Heatt v. Morris*, 10 Ohio St. 523; Washb. Easms. 497), that no prescriptive right to the use of light and air through windows can be acquired by any length of use or enjoyment. But it is claimed that the easement is granted by implication, arising upon the circumstances surrounding the execution of the deed. In other words, it is claimed that the grant is to be implied from the fact that the windows were in use at the time of the conveyance, and were necessary to the convenient enjoyment of the property, and that this implication is not rebutted by the fact that the lots were simultaneously sold at auction.

In the view we take of this case, it is unnecessary to consider the effect of the circumstance that the lots were simultaneously sold at auction. In a proper case, no doubt, that fact might go far to rebut the implication of a grant, and there are a number of decisions to that effect. In such a case it would, perhaps, be quite immaterial which deed was executed first, as the parties to the first deed would be held to have known and intended, at the time of its execution, that the other deed was to be executed also, and was to be made conformable to the terms and conditions of the sale, neither purchaser having any preference over the other. But we place our decision of the case upon other grounds, and need not, therefore, discuss the question whether it is varied by the fact that the lots were simultaneously sold.

Nor do we deem it necessary to discriminate between the case of an implied grant and that of an implied reservation in a grant. Some of the early English decisions stand upon the ground of such a distinction, holding that the same circumstances, of necessity or use, which would support an implication of grant, where the *dominant* estate is first sold,

will not support an implication of reservation where the *servient* estate is first sold.

What we hold is, that the law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the premises of another in any case. In our view, therefore, the law of the present case is not in the least varied by the fact that the dominant estate was conveyed first, or by the fact that both lots were sold at the same time. It seems to us that this doctrine of easements in light and air, founded upon sheer necessity and convenience, like the kindred doctrine of "ancient windows," or prescriptive right to light and air by long user, is wholly unsuited to our condition, and is not in accordance with the common understanding of the community. Both doctrines are based upon similar reasons and considerations, and both should stand or fall together. They are unsuited to a country like ours, where real estate is constantly and rapidly appreciating, and being subjected to new and more costly forms of improvement, and where it so frequently changes owners as almost to become a matter of merchandise. In cases of cheap and temporary buildings, the application of the doctrine would be attended with great uncertainty, and be a fruitful source of litigation. It would, moreover, in many cases, be a perpetual encumbrance upon the servient estate, and operate as a veto upon improvements in our towns and cities. It will be safer, we think, and more likely to subserve the ends of justice and public good, to leave the parties, on questions of light and air, to the boundary lines they name, and the terms they express in their deeds and contracts.

We know that the authorities on this subject are not uniform. But we believe the weight of American decisions is in accordance with the opinion here expressed. See *Maynard v. Esher*, 17 Penn. St. 222; *Haverstick v. Sipe*, 33 Id. 368, 371; *Dodd v. Burchell*, 1 H. & C. 112; *Myers v. Gimmel*, 10 Barb. 537; *Palmer v. Wetmore*, 2 Sandf. Sup. C. R. 316; *Collier v. Pierce*, 7 Gray, 18.

In *Haverstick v. Sipe* the court hold, that the grant of an easement for light and air is not implied from the fact that such a privilege has been long enjoyed; and that a contract for such privilege is not implied on the sale of a house and lot, from the character of improvements on the lot sold, and the adjoining lots. The court say: "There is a sort of necessity for such an implication relative to other apparent easements, such as roads and alleys, in order to account for a use of another man's land that would otherwise be a wrongful encroachment; and the implication is easily framed or defined, for it appears on the ground. But how can we define an easement for light and air by implication, without arresting all change in the style of buildings, all enjoyment of a man's house, according to the demands of a growing or improving family? A purchaser of a house in a crowded town never supposes that his neighbor will have a right to prevent him from changing the form of it according to his taste."

We fully concur in the opinion thus expressed, and in the reasoning upon which it is based.

Judgment reversed, and cause remanded for a new trial.

BRINKERHOFF, C. J., and SCOTT, WHITE, and DAY, JJ., concurred.¹

BUTTERWORTH v. CRAWFORD.

COURT OF APPEALS OF NEW YORK. 1871.

[Reported 46 N. Y. 349.]

APPEAL from judgment of the General Term of the Court of Common Pleas, for the City and County of New York, affirming judgment entered upon the report of a referee.

The facts of this case, as found by the referee, are as follows: Henry Vulkening in 1864 owned two houses adjoining each other on the north side of Forty-sixth Street, in the city of New York, known as Nos. 83 and 85 West Forty-sixth Street. While such owner, he dug and formed a vault, extending partly into the yard of each house, and constructed a drain from such vault, running through the lot of house No. 85, to the sewer in Forty-sixth Street. He then built a division fence between the yards of the two houses, extending from the rear of the houses to the rear of the lots, which fence was upon the division line, and crossed the vault in the centre. He constructed an outhouse on either side of such division fence, over the vault for said house respectively, the roof of such outhouse extending a few inches above the fence.

After constructing such vault and outhouses, on the 11th day of December, 1865, he conveyed the house and lot No. 85 West Forty-sixth Street, to the defendant in this action, by full covenant warrantee deed.

The defendant, immediately on the receipt of such deed, took possession of the said premises. Thereafter, on the 26th day of January, 1866, Vulkening conveyed said house, known as No. 83 West Forty-sixth Street, to the plaintiff.

In the summer of 1866, the defendant built a privy on his premises No. 85 West Forty-sixth Street, about twelve feet farther towards the rear of his lot, and extended the drain to the vault of such privy, and

¹ See, accord, *Keats v. Hugo*, 115 Mass. 204 (1874); *Kennedy v. Burnap*, 120 Cal. 488, 490 (1898). Contra, *Janes v. Jenkins*, 34 Md. 1 (1870); *Greer v. Van Meter*, 54 N. J. Eq. 270 (1896). Cf. *Rennyson's Appeal*, 94 Pa. 147, 153 (1880), where it is said that an easement of light may be raised by actual necessity, and see also *Robinson v. Clapp*, 65 Conn. 365, 385 (1895).

As between landlord and tenant, see *Doyle v. Lord*, 64 N. Y. 482 (1876); *Case v. Minot*, 158 Mass. 577 (1898).

then cut off the connection between that portion of the vault on the plaintiff's lot and the said drain.

The defendant upon the trial offered to show, that there was nothing in the appearance of the premises at the time he bought, to give notice that the privy was drained through his lot. This was refused by the referee, and the defendant's counsel excepted.

The defendant's counsel also offered to prove, that the defendant had no notice when he bought, that the privy was drained through his lot. This was refused by the referee, and the defendant's counsel duly excepted.

The referee, as conclusions of law, decided: That the defendant had no right to cut off or obstruct the communication, from that part of the vault on the plaintiff's lot, through the drain on the defendant's premises to the sewer in the street.

That the plaintiff was entitled to judgment, restraining the defendant from continuing such obstruction, and requiring the defendant to open such drain, and to restore the same to the condition it was in at the time of the said conveyance to the plaintiff.

N. Smith, for appellant.

H. R. Selden, for respondent.

RAPALLO, J. We have come to the conclusion, that the drain in controversy, did not constitute an *apparent* servitude or easement, and that consequently the case does not present the question so fully argued before us, whether when a dominant and servient tenement are owned by the same person, and he makes a conveyance of the servient tenement first, with covenants of warranty, and against encumbrances, and without the express reservation of any easement, such conveyance will preclude him or his assigns, from afterward asserting in favor of the dominant tenement, which he retains, the benefit of the easement in the premises so conveyed. We therefore refrain from expressing an opinion upon that point.

All the authorities cited on the argument, by the learned counsel for the respective parties, concur in holding, that the rule of law which creates an easement on the severance of two tenements or heritages, by the sale of one of them, is confined to cases, where an *apparent sign* of servitude exists on the part of one of them in favor of the other; or as expressed in some of the authorities, *where the marks of the burden are open and visible*.

Unless, therefore, the servitude be open and visible, or at least, unless there be some apparent mark or sign, which would indicate its existence to one reasonably familiar with the subject, on an inspection of the premises, the rule has no application.

There was nothing in the situation or appearance of the premises, to indicate that there was any drain from the privies in question. Drains are not a necessary accompaniment of privies constructed as these were. In cities, municipal regulations provide for their being cleansed by licensed public scavengers, and this practice is frequently brought

to the notice of the inhabitants in a very obvious manner. No evidence was introduced to show that drains from them were usual in the locality in question. But had such evidence been given, it does not appear, that there was anything to indicate, that the privy of the neighboring house was drained through the lot sold to the defendant.

In the case of *Pyer v. Carter*, 1 Hurl. & Nor. 916, which was much relied upon on the argument, and in the opinion of the learned court below, the dominant and servient tenement had originally been one house. This house had been divided into two parts. The drainage was of the water which fell upon the roof, and it may well be, that the situation and arrangement of the building were such as to indicate, that some drain necessarily existed as an appurtenant to the house, and that upon the division of the house into two parts, that drain became common, and afforded drainage for both of the parts through one of them.

Such seems to have been the fact; for the court says, in rendering judgment, that "the defendant must have known, or ought to have known, that some drainage existed, and if he had inquired, would have known of this drain."

That decision recognizes the necessity of establishing, that the servitude is apparent, or that there is an apparent mark or sign of it, and seems to be based on the fact, that the situation and construction of the premises afforded such a sign.

In Washburn on Easements (2d ed., page 68), the learned author, after reviewing the cases on this subject, states that he considers the doctrine of *Pyer v. Carter* confined to cases, where a drain is necessary to both houses, and the owner makes a common drain for both; and this arrangement is apparent and obvious to an observer.

If *Pyer v. Carter* goes farther than that, or, at all events, if it applies to cases where there is no apparent mark or sign of the drain, it is not in accordance with the current of the authorities.

The bearing of that case upon the question, whether the alleged easement was one of necessity, upon the point as to the order in which the tenements were sold, and upon the other questions, which were argued before us with so much learning and ability, need not be now considered, as we do not propose at this time to decide those questions; and for the same reason, we forbear reviewing the numerous other authorities to which we have been referred, basing our decision upon the single ground, that the servitude claimed was not apparent.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment accordingly.

TOOTHE v. BRYCE.

COURT OF CHANCERY OF NEW JERSEY. 1892.

[Reported 50 N. J. Eq. 589.]

On order to show cause why an injunction should not issue.

Heard upon bill and answer and accompanying affidavits.

The complainant, by his bill, seeks to establish and protect his right to the benefit of a flow of water to his premises from the defendant's premises, through two several pipes laid underground and forced up by two hydraulic rams, situate, with the spring that drives them, on the defendant's premises.

The facts as they appear in the pleadings and affidavits, or are admitted by the parties, for the purposes of this motion only, are as follows: Before and on the 13th of April, 1892, the defendant was the owner of a tract containing about forty-five acres, which comprised both tenements, situate in Madison, Morris county, New Jersey, and on that day entered into a written contract with the complainant, by which the defendant, in consideration of \$13,000, agreed to sell and convey to complainant, and complainant agreed to purchase and pay that price for the tract in question, consisting of forty-five acres and twenty-three one-hundredths of an acre, excepting thereout a house and barn and lot whereon they stood, containing one acre, the deed of conveyance to be delivered and the purchase-money paid on the 13th day of May, at eleven o'clock in the morning, at a specified place in New York city.

At the date of the contract there were upon the whole tract two dwellings, two barns, and a green- or hot-house, a spring of water and two hydraulic rams driven by its waters, with a pipe leading from each, one to the green-house and one to one of the barns. One dwelling and one barn and the green-house were on the part contracted to be conveyed; the other dwelling and barn, the spring and rams were on the lot of one acre reserved. Included in the sale were a lot of hot-house plants in the hot-house.

At and before the date of the contract the water was flowing continuously at both the barn and green-house, in the latter of which were the hot-house plants. The water was discharged at the barn into an open trough from which the cattle and horses drank, and at the green-house into a tank from which it was used in watering the plants. This flow was observed by the complainant, and he knew it was due to the action of a ram (he supposed there was but one) on the lot reserved, and such flow formed, in complainant's mind, a feature of value in the premises. The pipes and flow of water to the barn had existed for several years, but that to the green-house had been in use for less than two years. The ram which supplied it had been in place and use for

many years, and carried the water in a pipe along the road in front of the premises in question to a property adjoining it on the other side, which property was sold by the defendant in 1890 to another party, and the flow of water to it was cut off and the pipe turned from the road up to this green-house, and was in use there from that time on.

The corporate authorities of Madison have recently erected water-works for the use of the town and its inhabitants, but no main has as yet been laid in the street in front of these premises.

The negotiations for the purchase and sale were carried on between the complainant in person and an agent of the defendant, and nothing was said by either in their course about the flow of water. Such flow continued up to the date of the delivery of the deed. Before ten o'clock on the morning of that day defendant directed his employé in charge of the premises to stop the operation of the rams, and then proceeded by train to New York to deliver the deed, which was done about eleven o'clock. The man in charge stopped the ram supplying the barn at once, but left the one supplying the green-house running until three o'clock in the afternoon. So that in point of fact the water was probably not running to the barn at the moment the deed was delivered, but was running to the green-house. No notice was given to the complainant at the delivery of the deed that the flow of the water had been stopped, nor was any mention made of it by either party. The deed contained the usual verbiage as to appurtenances, including "ways, waters, privileges" &c.

The springs driving the rams are about fifteen feet lower than the barn and green-house, so that the water would not run naturally to either. The difference in height between the spring and the rams does not appear.

The parties agreed that the court should act upon its personal knowledge of the peculiarities of hydraulic rams, which, so far as necessary for present purposes, are as follows: By the use of this machine the power due to the fall from a given height of a given quantity of water is utilized to lift a comparatively small fraction thereof to a height greater than the source or head. The effect of the machine is precisely the same as would be that of a water wheel driving an ordinary pump. The advantage of the use of the ram is its extreme simplicity and durability. It works automatically and in theory should run without stopping or touch by the hand of man until its parts were actually worn out. It is, however, liable to stop and requires the hand of man to start it again. This liability is due to several causes, none of which are of any importance, and all can be guarded against by proper care in setting it and in preventing substances other than water from passing through it, except one, viz., a necessary part of the machine is a chamber of confined air which acts as a cushion. This air comes in contact with and is liable to be absorbed by the water and exhausted, and when the air-chamber becomes filled with water the ram works defectively and is liable to stop. The tendency of the air to be

exhausted varies with the character of the water and the height or head to which it is lifted. If the water is lifted to a great height there is a corresponding pressure of the water upon the air and the absorption of the air by the water is increased thereby, but with a small height to lift against, like fifteen, twenty or thirty feet, rams may run for weeks and months without stopping. The process of recharging the air-chamber with air is very simple and may be done by any person in a few minutes. An hydraulic ram, properly set, may run for one or more years without any repair, and the operation of repair or renewal is very simple.

Mr. John C. Besson and Mr. Aub (of New York), for the complainant.

Mr. George G. Frelinghuysen, for the defendant.

PITNEY, V. C. The complainant rests his right to the continued flow of the water upon the fact that such flow was apparent and continuous at the time of the purchase, and constituted a valuable adjunct to the premises, rendering their use more beneficial and valuable.

Against the case thus made defendant makes three points—*first*, that the use of the water in the way described was not *necessary* to the enjoyment of the premises; *second*, that it was not in actual use at the moment when the title passed; *third*, that it was not in its nature continuous, since the water did not run by gravity, but by machinery, which required the intervention of the hand of man, upon the land of the grantor, the defendant.

I. As to the element of necessity. I think some inaccuracy of thought and expression has arisen in the discussion by bench and bar of this doctrine of the creation of an easement by implication upon the severance of a tenement, as to the importance of the element of necessity, by failing to distinguish between that class of cases where it has been held or claimed that an easement is *reserved* by implication in favor of that portion of the tenement which is retained by the grantor in and upon that portion conveyed, and that other class of cases where it has been held that an easement was *granted* in favor of the part conveyed in and upon the part reserved. In the former class of cases the grantor is usually claiming an easement in direct derogation of his own grant, while in the latter it is well held to be in accordance with, and to flow naturally by implication from, his grant.

In fact it has been suggested that the grant in such cases is not by implication, but that the *quasi*-easement passes with the *quasi*-dominant tenement as, in substance, a part of the thing conveyed, and without any regard to the element of necessity. On the other hand, in the case of a reservation, it has been held that there can be no implied reservation of an easement in the land granted when the grantor has conveyed, as he generally does, all his right, title and interest therein, except such an easement as is absolutely necessary to any enjoyment of it whatever, as in the case of a way of necessity. *Gale & W. Easem.* *72; *Godd. Easem. (Am. ed.)* 266, 267; *Nicholas v. Luce*, 24 Pick.

102; *Oliver v. Pitman*, 98 Mass. 46; Washb. Easem., *163, *164, and cases.

To permit the grantor to claim such reservation is to permit him to derogate from his own grant. So rigid was this rule held that in the older cases the reservation of a right of way to and from the close retained by the grantor out of the conveyance of the land surrounding it was put on the ground of the interest that the public had that the close so surrounded should not be unused and unproductive. The conveyances in common use in this country contain an express conveyance of all the right, title and interest of the grantor in and to the premises conveyed, and it is difficult to perceive on what ground short of absolute necessity any easement could be reserved.

This distinction between a grant and a reservation by implication seems to be founded in logic and, as will appear further on, is now thoroughly established in the English tribunals, and it seems to me to furnish the true test as to the value and importance of the element of necessity in the establishment of easements upon the division of tenements.

My examination of the authorities has led me to the conclusion that where the right to the easement is based upon the ground that it passes, as in substance, a valuable adjunct to the land conveyed, the element of necessity is not a requisite, and to use the word "necessary" in connection with it is to misuse it. In saying this, I may say that I am, in appearance at least, going contrary to what has been said and decided in many cases; but I think that an examination of them will show that in most, if not all, of those instances where the case was that of an implied grant of an easement in connection with the conveyance of a *quasi*-dominant tenement, the so-called "necessity" upon which the judges relied was, in fact, no necessity at all, but a mere beneficial and valuable convenience, and that this elevation of a mere convenience to the level of a necessity was the result of an attempt to obliterate the distinction between an implied grant and an implied reservation, before referred to, and to place implied reservations and implied grants upon the same footing, and to hold that upon the severance of a tenement one part of which had been subjected to a *quasi*-servitude, which was continuous and apparent, in favor of the other, the easement would be preserved, whether it be by grant, when the dominant tenement is conveyed, or by reservation, when the servient tenement is conveyed; and as the latter could only occur where the element of necessity was present, it was held that such element must also be present in the former case.

In the leading case of *Nicholas v. Chamberlain* (1606), Cro. Jac. 121, the distinction would seem to have been entirely overlooked, for it was resolved, as reported, that "if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the

house, the conduit and pipes *pass* with the house, because it is necessary and *quasi-appendant* thereto" &c.

I stop to say that I am unable to avoid a suspicion that the words "*or sells the land to another, reserving to himself the house,*" were not a part of the report when first prepared, but are an interpolation. The context indicates this. For how could the conduit and pipes be said to *pass with* the house if it was not *conveyed*, but *retained* by the grantor? What follows in the way of discussion by the judges upon supposititious cases indicates the same thing.

My interpretation of this report is that it holds that, if the house be conveyed, the pipes and conduit pass with it as *quasi-appurtenant* thereto. If the land be conveyed and the house retained, the pipes and conduit are reserved, if necessary to the use of the house. To reserve them on any other ground than necessity, would be to permit the grantor to derogate from his own grant.

The distinction between a grant and reservation was pointed out in *Palmer v. Fletcher* (1668), 1 Lev. 122, which was an action on the case for stopping lights. A man erected a house on his own land, and afterwards sold the house to one, and, still later, the land adjoining it to another, who obstructed the lights of the house, and it was resolved "that though it was a new message, yet no person who claimed the land by purchase from the builder of the house could obstruct the lights any more than the builder himself could, who could not derogate from his own grant, for the windows were a necessary and essential part of the house." And Mr. Justice Kelynge said: "Suppose the land had been sold first, and the house after, the vendee of the land might stop the lights."

Here it is manifest that there could have been no actual necessity for the use of the windows. The house could have been used without them, but their presence added to the value of such use. That and nothing more, for, if the lights were actually necessary, they would be reserved against the grant of the adjoining land precisely as would be a way of necessity.

In *Cox v. Matthews* (1678), Vent. 239, Sir Matthew Hale said: "If a man should build an house on his own ground, and then grant the house to A., and grant certain land adjoining it to B., B. could not build to the stopping of its lights in that case."

And Chief-Justice Holt, in *Rosewell v. Pryor* (1701), 6 Mod. 116, held the same thing.

And again, in *Tenant v. Goldwin* (1704), 2 Ld. Raym. 1098, Chief-Justice Holt is reported as saying: "If, indeed, the builder of the house sells the *house*, with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house, and as *he* cannot do it, so neither can his vendee. *But if he had sold the vacant piece of ground and kept the house without reserving the benefit of the lights, the vendee might build against his house.* But in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights."

Here, again, if the lights were necessary to the use of the house, they would be preserved either way.

These cases were approved and followed by Chief-Justice Tyndall in *Swansborough v. Coventry* (1832), 9 Bing. 805, and again by the court of exchequer in *White v. Bass*, 7 Hurlst. & N. 722.

Canham v. Fisk (1831), 2 Crompt. & J. 126, was the case of a conveyance of a garden through which flowed an artificial water-course, carrying water from adjoining lands owned by the grantor. The plaintiff, the grantee, sued for diversion of the water of which he had had less than twenty years' use. At the trial he did not produce his deed. Lord Lyndhurst said: "The plaintiff has been in possession of this garden since 1811. That possession is evidence of a fee which can only pass by grant, and a grant of the land would carry the water. If the conveyance had been produced and had been silent as to the water, still the conveyance would have passed the water which flowed over the land." And Baron Bayley said: "If I build an house, and, having land surrounding it, sell the house, I cannot afterwards stop the lights of that house. By selling the house, I sell the easement also. This land is purchased with the water running upon it, and the conveyance passes the land with the easements existing at the time."

It will be observed that the element of necessity was not considered, and it seems to me that the whole law as to implied grants is there clearly stated.

Wardle v. Brocklehurst (1859), 1 El. & E. 1058, was a case like the present, where the right to the use of water flowing through an artificial water-course was claimed under a grant which conveyed the premises in the usual terms, "together with water and water-courses, privileges" &c. Lord Campbell, in delivering judgment, used this language: "We think the effect of that deed of conveyance was to prevent the plaintiff from having a right to complain of the defendant continuing to use the water, as being a wrongful diversion of the stream. The owner of the plaintiff's land, and of the land where the diversion took place, grants the Red House Farm to the defendant. This, we think, *was a grant of the farm in the state in which it then was, with the water flowing through the culvert. The defendant had a right to have the farm continued in that state.* He had a right to the estate, with the culvert so running through it, as it did at the time when the conveyance was executed; and he was entitled to have the water flowing through that culvert, so that he might help himself, by means of the pipe, to the water from the culvert, for the supply of his Red House Farm premises. *The land must be taken to be conveyed in the state in which it then was;* that is, we must take it that the culvert so bringing down the water, and all the water-courses, &c., are granted, not only those which belong and appertain to the premises, *but also those which were used or enjoyed therewith.* After such a grant we think it impossible to say that the then owner of the plaintiff's land did not agree by deed that the water should continue to run down the stone culvert,

and that he did not give up any right, which he might before have had, to insist on the water going down the Shores Clough Brook, toward the land which the plaintiff now enjoys. *Setting up such a right would be derogating from his own grant*, by preventing the water from flowing down the culvert in the course in which it had been accustomed to flow and did flow at the time of the execution of the conveyance, and be hindering the defendant from the right of using it for the purposes of the Red House Farm by means of pipes running through the culvert."

It will be observed that no reliance is placed upon any notion of any necessity.

This judgment was affirmed in the court of exchequer chamber, where, as well, no mention is made of any element of necessity.

Just before this case the famous case of *Pyer v. Carter* (1857), 1 Hurlst. & N. 916, was decided, which was the case of a drain, which carried water from the plaintiff's house under the defendant's house to a public sewer. Plaintiff's grantor owned both houses, and had constructed the drain, and had conveyed one house to defendant before he conveyed the other to the plaintiff; so that the case is, apparently, one of implied *reservation* of an easement by a grantor against grantee; and in point of fact, the first and only one in the English reports after *Nicholas v. Chamberlain*; and it was held that the easement was reserved on the ground of *quasi-necessity*. But it was also held that the question of necessity must be determined upon the condition of affairs at the date of the conveyance to the defendant, and the fact that the plaintiff could construct a drain to the sewer at a trifling expense without crossing the defendant's land was held immaterial. The court relied upon *Nicholas v. Chamberlain* and the text of Gale on Easements (second edition of Gale & Whatley), and does not appear to have attended to the distinction between a grant and a reservation.

This case has been severely criticised, and the principle upon which it was put has been distinctly and finally overruled in England, as will appear further on; but it has been held to have been rightly decided upon a circumstance existing which was not noticed or relied upon in the judgment of the court. That circumstance was this: At the severance of the title of the two houses, the condition of things was that water from the eaves of the defendant's house fell on to the plaintiff's house, and from thence flowed down a spout into a drain on the plaintiff's premises, and from thence, through the drain in question, under the defendant's premises, into the common sewer; so that, in point of fact, the apparent and continuous easement was one by which water from the defendant's house was discharged on the plaintiff's house, and from thence escaped through the drain in question under the defendant's house, resulting in mutual easements; the defendant's house had an apparent easement upon the plaintiff's house, and the plaintiff's house had an apparent easement upon the defendant's land, and it would have been inequitable in the extreme to permit the defendant to

say that the plaintiff did not have an easement over his land by which the very water that came on the plaintiff's land from the defendant's land was got rid of.

Pyer v. Carter was cited with approval in the Scotch appeal of *Ewart v. Cochrane* (1861), 7 Jur. (N. S). 925, 4 Macq. H. L. Cas. 117, by Lord Campbell, as authority for the case of a drain from the land of the grantee to and upon that of the grantor, and, therefore, the case of an implied grant and not of an implied reservation; and Lord Campbell apparently fails to notice the distinction, and puts the case on the ground that the drain had been used, and was necessary for the comfortable enjoyment of that part of the property which was granted. He expresses himself thus: "When I said it was necessary, I do not mean that it was so essentially necessary that the property could have no value whatever without this easement, but I mean it was *necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant.*"

Now it seems to me that this resort to a modification of the force of the word "necessary" shows that it is not appropriate to the occasion and ought not to be used in such connection.

Polden v. Bastard (1863), 4 Best & S. 257, L. R. 1 Q. B. 156, on appeal, was the case of a right of way to and from a well and to take water therefrom. The right failed on the distinction between a continuous and non-continuous easement, the present being held nothing more than a right of way and so non-continuous.

Chief-Justice Erle, in his judgment on appeal (L. R. 1 Q. B. 161), says: "There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements; and it is clear law that upon the severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law, without any words of grant."

This language shows, as I think, that the learned chief-justice did not consider that *necessity* was a requisite if the easement be apparent and continuous. The word "or" is used to distinguish between easements of necessity and continuous easements.

Lord Westbury in *Suffield v. Brown* (1864), 4 DeG., J. & S. 185, attacked and repudiated the doctrine of implied reservation asserted in *Pyer v. Carter*, and declared, though not necessary to the decision of the cause, that a grantor cannot derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time continuous and apparent easements. He also refuses assent to the doctrine on this subject found in *Gale on Easements* *49, which he declares a novelty in English jurisprudence, points out its origin in the French civil code and declares that it is contrary to English law. He disapproves of *Pyer v. Carter*, and attempts to distinguish it from *Nicholas v. Chamberlain*.

This doctrine of Lord Westbury was expressly approved and applied by Lord Chelmsford (who sat with Lord Campbell in *Ewart v. Coch-*

rane), in *Crossley v. Lightowler* (1867), L. R. 2 Ch. App. 485, and he declares that no reservation of an easement could be implied except in case of absolute necessity.

In other words, these learned judges thought that there could not be an implied reservation of an easement except by reason of absolute necessity, as in the case of a way of necessity. And Lord Westbury held that a grant of an apparent and continuous easement will be implied upon ordinary principles of construction.

This distinction between an implied grant and an implied reservation was taken in the later case of *Watts v. Kelson* (1870), L. R. 6 Ch. App. 166, decided by Lord-Justices Mellish and James, both eminent judges. That was a case of a water-course, and the quasi-dominant tenement was (as here) first conveyed by a deed containing the same verbiage as is found in the one in this case, and Lord-Justice Mellish, after referring to Lord Westbury's criticisms of *Pyer v. Carter*, and showing that they did not apply to the case in hand, held that the easement passed by the grant, and continued: "It was objected before us, on the part of the defendant, that on the severance of two tenements no easement will pass by an implied grant, except one which is necessary for the use of the tenement conveyed, and that the easement in question was not necessary. We think that the water-course was necessary for the use of the tenement conveyed. *It was, at the time of the conveyance, the existing mode by which the premises conveyed were supplied with water, and we think it is no answer that, if this supply was cut off, possibly some other supply might have been obtained.* We think it is proved on the evidence that no other supply of water equally convenient or equally pure could have been obtained. *We are also of opinion that the language of the conveyance was sufficient to pass the right to the water-course, even if it was not necessary, but only convenient, for the use of the premises.*"

It seems to me that the true rule is stated in this last sentence.

In the still more recent case of *Wheeldon v. Burrows* (1879), L. R. 12 Ch. Div. 31, the whole question was gone over; the distinction between an easement arising by reservation and one arising by grant was thoroughly considered and discussed both by the vice-chancellor and the lord justices on appeal, and the distinction in question pointed out and sustained; the case of *Nicholas v. Chamberlain* was explained, and the principle upon which *Pyer v. Carter* was decided was distinctly overruled, and it was held that there could be no reservation of a right of this kind except on the ground of absolute necessity.

The result of these English cases is thus stated by Mr. Goddard, in his treatise, writing before *Wheeldon v. Burrows* was decided (Godd. Easem. (Am. ed.) 119 bottom, 120 top):

"If the owner of an estate has been in the habit of using quasi-easements of an apparent and continuous character over one part for the benefit of the other part of his property, if he sells the quasi-dominant part, the purchaser will, in the absence of express stipulations,

and independently of the general words in the deed of conveyance, become entitled to the easements by implied grant, but if [he] sells the *quasi-servient* part, these easements will not be reserved by implied grant."

He thus eliminates the element of necessity from the subject.

Mr. Bennett, in his *addenda* to the American edition of this treatise, (at pp. 122, 124,) states the result of the later American decisions to be the same, stating the doctrine substantially thus: If the *quasi-dominant* tenement be conveyed, a *quasi-easement* will pass, if it be continuous and apparent, and also convenient and beneficial. If, however, the *quasi-servient* tenement be conveyed, a *quasi-easement* will not be reserved by implication, unless it be absolutely necessary.

In the original text of Gale & Whatley on Easements *49 ch. 4 (1839), the learned authors say:

"The implication of the grant of an easement may arise in two ways: First. Upon the severance of an heritage by its owner into two or more parts; and, secondly, by prescription. Upon the severance of an heritage a grant will be implied, first, of all those *continuous and apparent easements which have in fact been used by the owner* during the unity, though they have had no legal existence as easements; and, secondly, of all those easements without which the enjoyment of the severed portions *could not be fully had*."

It will here be observed that in asserting that continuous and apparent easements will pass by grant he makes no mention of any necessity as a requisite therefor.

In the later editions of this work, prepared by Mr. Gale himself, and cited as Gale on Easements, this language is changed thus:

"Upon the severance of an heritage a grant will be implied, first, of all those continuous and apparent easements which have in fact been used by the owner during the unity *and which are necessary for the use of the tenement conveyed*, though they have no legal existence as easements; and, secondly, of all those easements without which the enjoyment of the severed portions could not *be had at all*."

The author gives no reason for this change and cites no authority for it.

Now, in my opinion, the first part of the proposition was correctly stated in the first edition, and the second part of it was correctly stated in the later editions and not in the first. And a careful examination of the authorities leads me to the conclusion that this introduction into the second edition of this useful and much relied upon treatise of the quality of necessity as requisite in an apparent and continuous easement, in order that it should pass with a grant, was its first introduction into our system of jurisprudence. For while it was mentioned in *Nicholas v. Chamberlain* (1606), and *Palmer v. Fletcher* (1668), the cases which intervene between those cases and the publication of Mr. Gale's second edition do not show that it was considered a requisite.

This author stoutly maintains that the *quasi-easement*, when con-

tinuous and apparent, is preserved on a severance of the tenement, as well by way of *reservation* as by way of *grant*, and he relied not so much on the resolution in *Nicholas v. Chamberlain* as upon the principle found in the French civil code called "the disposition of the owner of two tenements" — "*destination du père de famille*" — and in his first edition, as already shown, he makes no mention of any element of necessity, nor is any found in the French code. His reasoning is quite independent of any aid from such element. It is, however, inconsistent with the settled construction put upon the conveyances in use in England, and was thoroughly exploded, first by Lord Westbury in *Suffield v. Brown*, and later in the other cases above cited.

Turning now to the authorities in this country, we have the leading case of *Lampman v. Mills* (1860), 21 N. Y. 505, in which Mr. Justice Selden makes an elaborate examination of the authorities, including *Nicholas v. Chamberlain* and the first edition of Gale & Whatley on Easements, but not noticing *Pyer v. Carter*. The case before him did not call for any expression of opinion upon the question of implied reservation, it being one of implied grant and not of implied reservation. He, however, declares that, upon a severance of an estate, an implied reservation of an apparent and continuous easement would obtain where the servient tenement was conveyed and the dominant reserved. The learned judge placed no reliance upon, and made no mention of, any element of necessity. He cited and followed in this respect the text of the original edition of Gale & Whatley on Easements, which as we have seen, omits mention of that element in these cases.

Curtiss v. Ayrault (1871), 47 N. Y. 73, was the case of a water-course, and, in substance, the same as *Canham v. Fiske*, *Wardle v. Brocklehurst* and *Watts v. Kelson*, *supra*. The owner of a large tract of land, upon which was a marsh, dug an artificial water-course, by which the marshy part was drained and another part supplied with water for cattle, and then severed it by conveyances made at one time. It was held that the grantee of the part supplied with water was entitled to have the flow continued from the marshy part, and the grantee of the marshy part had no right to stop it. The ground of the decision is thus stated: "Where the owner of a tract of land, upon which was a marsh, has dug a ditch therefrom through other portions of the tract, making a permanent channel, in which the water gathered in the marsh flows in a continuous stream, mutually benefiting the land drained, and the lands to which is conveyed a supply of good water, and subsequently, and while these reciprocal benefits and burdens were existing and apparent, has divided the tract into parcels, and conveyed the parcels to different grantees, who contracted with reference to such a condition of the lands, the respective grantees have no right to change the relative condition of one parcel to the injury of another. *It is the open and visible effect which the change has wrought which is presumed to influence the mind of the purchaser. The question is, did*

the purchaser, in arriving at the price he would pay, consider, and have a right to consider, as an element of the value of the land he was bidding for, the benefits it derived from the artificial channel?" This seems to me to be the true ground of judgment in these cases.

Turning now to the cases in this state, we find that the distinction between a *reservation* and a *grant* was taken and upheld by Chancellor Williamson in *Brakely v. Sharp*, 1 Stock. 9, and, again, in the same case, 2 Stock. 207; and, again, noticed by Chancellor Green in *Seymour v. Lewis* (1861), 2 Beas. 439 (at p. 444). This last was a case of *reservation*, and it was held that, under the circumstances of the case, the easement was reserved. The chancellor relies upon *Gale & Whatley* on Easements and the resolution in *Nicholas v. Chamberlain*, and upon the circumstance that the tenements severed were (as in *Pyer v. Carter*) both dominant and servient with mutual easements, and that the one conveyed had an easement to have the water discharged over the land reserved, as well as the latter to have it flow from the former (see 2 Beas. 448, 449), and, as I interpret the case, he makes no use of the element of necessity. He refers to the original text of *Gale & Whatley*, and also to the then recent case of *Lampman v. Milks*, 21 N. Y. 507, in which, as we have seen, the element of necessity is not mentioned.

The same learned judge asserted the same doctrine — that *reservation* and *grant* stand on the same footing — in the *Central R. R. Co. v. Valentine*, 5 Dutcher, 561, in the court of errors and appeals. There Valentine claimed under an express reservation in his lessor's deed to the railroad company. But the chancellor declared (at p. 564) that the right would have been reserved by implication without any express reservation; and he cites *Lampman v. Milks*, *Nicholas v. Chamberlain*, *Pyer v. Carter* and *Gale & W. Easem.*, *supra*, and makes no reference to any element of necessity.

The case shows that this *dictum* was wholly *obiter*, and not necessary to the decision of the cause.

Chancellor Zabriskie in *Fetters v. Humphreys* (1867), 3 C. E. Gr. 260 (at pp. 262, 263), notices the distinction, but declares that the right is mutual and that the easement is reserved where the *quasi-servient* tenement is conveyed and the dominant tenement reserved, relying, as did Chancellor Green in *Central R. R. Co. v. Valentine*, upon *Nicholas v. Chamberlain*, *Pyer v. Carter*, and *Lampman v. Milks*.

He asserted the same doctrine in *Denton v. Liddell*, 8 C. E. Gr. 64, and in both cases the assertion was *obiter dictum*, and not necessary to the decision of the cause.

De Luse v. Bradbury, 10 C. E. Gr. 70, was the case, like the present, of a conveyance of the *quasi-dominant* tenement by the owner of the *quasi-servient* tenement, and, as here, involved the right to the flow of water from a spring on the servient tenement for the use of the dwelling on the dominant tenement. The right was established without resort to the element of necessity.

The latest case in this state is *Kelly v. Dunning*, 16 Stew. Eq. 62, decided by Vice-Chancellor Van Fleet in 1887. That, like this, as I infer from the report, was the case of a conveyance of a *quasi-dominant* tenement, and the retention of the *quasi-servient* tenement, and, therefore, a case of *grant* and not of *reservation*. The right was one of drainage. The complainant purchased his tenement of one Trippe, the owner of both tenements, in 1867. At that time the drain was in existence, carrying the water from complainant's lot across the remainder of Trippe's land, a part of which was conveyed to the defendant in 1884. In discussing the doctrine applicable to the case the learned vice-chancellor treats it as settled in this state that there is no difference between the case of a reservation of an easement where the conveyance is of the servient tenement, and the case of a grant where the conveyance is of the dominant tenement, following in this respect the decision of Chancellor Green in *Seymour v. Lewis*, and the *dicta* of the same judge in *Central R. R. Co. v. Valentine*, and of Chancellor Zabriskie in *Fetters v. Humphreys* and *Denton v. Liddell*, and he holds that, under those authorities, a certain measure of necessity for the use of the easements is a requisite in each case. And, following the definitions of the late English cases, he holds that, if the easement be *necessary for the convenient and comfortable enjoyment* of the property as it existed at the time of the conveyance, it will pass. In this he is supported by the latest English case — *Wheeldon v. Burrows* — and by the late New York cases.

These cases in our own state have probably established the doctrine here — certainly in this court — that in these cases of apparent and continuous easements, upon the severance of the tenement, a *reservation* of a *quasi-easement* will take place on the conveyance of the servient part, wherever it would pass by way of *grant* on the conveyance of the dominant part, and that in each case the element of necessity is a requisite. But for myself, I desire to repeat, by way of protest, that my examination of the authorities has led me to the conclusion that this doctrine of mutuality is not founded on solid ground and is mischievous in its tendencies, and also that it is a misapplication of the word "necessary" or "necessity" to apply it to such a case, and leads to uncertainty and confusion in attempting to define different degrees of the element, when, in fact, strictly speaking, it is not capable of being graded.

It seems to me that the proper inquiry in such cases is whether the apparent and continuous easement in question forms a part of the tenement, and is beneficial to and adds to its value for use, and will continue to do so in the future. If it is, then the grantee is, upon plain principles, entitled to have it continued. He is entitled to enjoy the thing as it was when he bought it, with all its apparent appurtenances, if those apparent appurtenances are apparently permanent, and are useful and add to its value.

In the case in hand, I think there can be no doubt that the flow of

the water at the barn or stable and at the green-house are valuable additions to the property, increase its beneficial use, and also that it is necessary in the sense in which that word has been used in that connection, and is defined by Vice-Chancellor Van Fleet in *Kelly v. Dunning*; and I adopt the language of Lord-Justice Mellish in *Watts v. Kelson*, above quoted, as applicable to this case.

It would be no answer to say, if it were true, that the complainant may procure water to supply these places from the public water-works at a comparatively trifling expense. That expense, though trifling, is continuous, and it was the relief from its burden which formed the element of value in the water which was actually flowing.

II. The second objection made presents little difficulty. Complainant is clearly entitled to have the premises in the condition which they were at the time he made the contract — April 13th, 1892. His right to them vested at that date. As the contract was positive and binding on both parties — defendant being bound to convey and the complainant to purchase and pay the price — the familiar rule in equity is that from that time on, the premises in question belonged to the complainant, subject to the lien of the purchase price, and that the purchase price belonged to the defendant. It would be monstrous, indeed, to hold that the defendant might, at the very moment that the deed was being delivered in New York, by his agent in Madison destroy an apparent and continuous easement and deprive the complainant of the benefit of it.

Nor can the defendant, as the case now stands, deny the right of his agent to sign the contract for him as his agent. The execution of the deed in pursuance of it was a ratification and adoption of the previous contract, with all its burdens as well as its benefits.

III. The third question presents more difficulty. Was the easement in its nature continuous, considering the fact that the water did not run by gravity, in the ordinary sense of the term, but was forced up by a machine driven by the power of the fall of a greater quantity, and that it would be necessary for the complainant to enter on the servient tenement from time to time to readjust, repair, and renew this machine?

All cases of this character deal with artificial structures, situate in whole or in part on the servient tenement, which are liable to fall into disorder and decay, and all the adjudged cases hold that the owner of the dominant tenement may enter upon the servient tenement for the purpose of repairing and renewing those artificial structures. It was so declared in *Nicholas v. Chamberlain*, and Mr. Gale quite properly calls this right of reparation and maintenance a "secondary easement" (*Gale & W. Easem.* *323; *Washb. Easem.* *24, *25), which is appurtenant to the primary or actual easement.

If, in the case in hand, the water ran by gravity in an artificial channel, complainant would have the right to enter from time to time upon defendant's land, and repair and renew such part of it as was there situate. So if the water — supposing it to be practicable — were

raised by a dam instead of a ram to the height necessary to make it flow to the barn and green-house, the right of reparation and renewal of this dam would be included, and, in such a case as this, the head or power would be employed to carry it.

These secondary easements, however, are not the easement which passes with the conveyance by implied grant because apparent and continuous. They are, as before remarked, merely incidents thereto, and, because of their non-continuous and desultory character, the principal easement is none the less continuous.

In this connection, what is said by Mr. Gale in his treatise is not without import (*50):

"An easement is a quality superadded to the usual rights, and, as it were, passing the ordinary bounds of property; and, with the exception of those easements the enjoyment of which depends upon *an actual interference of man at each time of enjoyment, as of a right of way*, it is attended with a permanent alteration of the two heritages affected by it, showing that one is benefited and the other burdened by the easement in question."

His idea of a non-continuous easement is one whose enjoyment depends upon an actual interference of man at each time of enjoyment—as in *Polden v. Bastard, supra*. And it seems to me that that is the correct test, and that the mere fact that a machine is used which is substantially self-acting, and does not require the constant attention of man, does not make it non-continuous, any more than the propulsion of the water by a dam through an artificial channel would have that effect. It is said that the owner of the servient tenement will be subjected to the servitude of a more frequent entrance upon his land for the purpose of adjusting and repairing the ram than he would in case of an artificial ditch or pipe or dam. But I think the difference is one of degree and not of character, and it is hardly necessary to say that a mere difference of degree will not alter the case.

I will advise that an injunction issue.

LARSEN v. PETERSON.

COURT OF CHANCERY OF NEW JERSEY. 1894.

[Reported 53 N. J. Eq. 88.]

HEARD on pleadings and proofs.

Mr. Edwin B. Goodell, for the complainant.

Mr. Scott German, for the defendant.

PITNEY, V. C. The object of this bill is to establish and protect complainant's right in, and enjoyment of, an easement.

The circumstances, which are not open to serious dispute, are peculiar. For some years prior to and on the 1st day of June, 1893,

Mrs. Elizabeth Mabey, of Montclair, Essex county, was the owner of a lot of land fronting on Elmwood avenue, in that city, upon which was a double frame dwelling, comprising, under one roof, two complete dwellings, separated only by an ordinary lath and plaster partition, without any openings. Some years before that date she had procured a well to be drilled in the earth and underlying water-bearing rock in the rear of this building, and had laid therefrom two independent water-pipes placed in the earth, leading to the dwelling, one into the sink of each kitchen. Each dwelling was supplied with an ordinary hand-pump, and in this manner, and in no other way, each of the separate dwellings was supplied with water. There was nothing visible on the ground in the rear of the house to indicate the existence of a well or its connection with the dwelling, and there was no water-main in the street.

This being the situation, Mrs. Mabey, in the spring of 1893, was minded to sell this property, but was unwilling to sell a part without the whole. At the same time, both complainant and defendant were desirous of purchasing houses for their individual use, and, hearing of this property, called together on Mrs. Mabey—that is, complainant and John Peterson, acting as agent for his wife—and looked at the property. They looked at only one of the dwellings—that in the actual occupation of Mrs. Mabey, the other being in the occupation of a tenant—and were informed, and truly, by Mrs. Mabey, that the two dwellings were precisely alike in all respects, and, indeed, this was plainly indicated by their exterior appearance. In the kitchen of the part occupied by Mrs. Mabey, both complainant and Peterson saw and particularly noticed the pump in the sink and tasted the water from it, and were informed that it came from a drilled well in the back yard, and that both dwellings were supplied in the same way and from the one well. The precise location of the well was not pointed out, and was not known either to Mrs. Mabey or to either of the parties until after the conveyances presently to be mentioned. Both complainant and defendant knew that there was no water-main in the street. On that occasion complainant and John Peterson agreed together, and with Mrs. Mabey, to purchase the property at a price named, and agreed that it should be equally divided between them, and that the title should be made to each in severalty according to a dividing line to be agreed upon between them and actually run on the ground by a surveyor in such a manner that it should run through the partition separating the two dwellings, and then divide the land as nearly equally as practicable. Peterson at the same time gave \$10 for the choice of the houses, and then and there chose the house in which Mrs. Mabey was living; but such choice had no reference to the location or control of the well, and was influenced entirely by the circumstance that the house so chosen had, owing to the shape of the lot, more light and air in its front and side than the other. The survey was had accordingly, and a description of the dividing line given, and deeds of conveyance in accord-

ance with it, dated June 1st, 1893, were executed by Mrs. Mabey on June 5th, and duly delivered at the same moment, one to complainant and the other to Mrs. Peterson, the wife of John. Both parties took possession. Subsequently Peterson discovered that the well was on his land, and then cut off the pipe leading to complainant's kitchen, who thereupon attempted to repair it and was prevented by the defendant; whereupon he filed this bill asking that his rights in the premises may be established, and the defendant enjoined from preventing him from renewing the water-pipe connection with the well. Upon the filing of the bill an injunction was granted accordingly, and the complainant took advantage of it to restore the connection between his pump and the well to its former condition.

At the hearing there was no contention that the well did not supply water enough for both families, or that complainant had made an unreasonable use of it.

The above are the facts as I have found them. Peterson does, indeed, deny that he was told on the occasion in question that the other dwelling had a pump like the one they inspected, or that there was but one well for both houses. But the contrary is supported not only by the evidence of complainant, but also by that of Mrs. Mabey and her daughter, both disinterested witnesses — or rather, if they have any interest, it is against complainant, since Mrs. Mabey gave Mr. Peterson a warranty deed — who gave their evidence in a way to command the belief of the court. Besides, Peterson does not deny that he saw the pump and heard that it was supplied with water from a well, but does deny that he was told that the other dwelling was similarly supplied. But he knew that both dwellings were a part of one building, and that in external appearance they were precisely alike; that the other dwelling was occupied; he fixed the value of the choice between the two houses at only \$10, which was due, as he admits, to a difference in the size of the front yard, which would necessarily result, as shown by the plot, from a division of it in the way proposed and agreed upon. He does not contend that his choice was due to any supposed difference in the interior of the houses, or to the presence of water in one and its absence in the other, or that he supposed that each house had an independent supply of water. These circumstances render it highly improbable that he did not, in some way, learn that both dwellings were supplied with water in the same way and from the same source. It was, to say the least, not probable that the proprietor of such a lot and building would incur the expense of an independent water-supply to each dwelling.

Upon this case, the complainant, in his able brief, makes two points which support each other, and either of which, standing alone, he contends, entitles him to relief. *First.* That the well and aqueduct running therefrom to complainant's house constitute a change of a permanent nature in the structure of the defendant's tenement, made for the benefit of complainant's tenement by the owner of both, of which

defendant had actual notice through her agent before she purchased, and which was of such a nature as to be discovered on an examination, and hence became an apparent and continuous easement in favor of complainant's tenement upon the defendant's tenement. *Second.* That the effect of the transaction between complainant, defendant and Mrs. Mabey, was a purchase by the two jointly from Mrs. Mabey, with an agreement between the two that the property should be divided in the manner stated, and that the arrangement for the supply of water for each house should remain as it was.

It seems to me that the controlling question is, whether the arrangement for the supply of water to complainant's house constituted what is known to jurists as a "continuous and apparent" easement, which was "necessary" in the sense in which that word is used in that connection, for the comfortable use and occupation of the complainant's premises.

As to the quality of its being "apparent," the fact that it was, in part, hidden in the earth, and so not physically apparent to the eye, is not conclusive. The part on complainant's land — the pump — was visible, and the water must have come either from the land actually conveyed to him or from that conveyed to Peterson. Independent of the actual notice, I am of opinion that Mrs. Peterson, under the peculiar circumstances of this case, is chargeable with notice that there was such a pump on the complainant's tenement, and that it might connect with the well or cistern on the part that was conveyed to her.

It seems to be well settled that the mere fact that a drain or aqueduct, as the case may be, is concealed from casual vision, does not prevent it from being "apparent" in the sense in which that word is used in that connection. The aqueduct, in *Nicholas v. Chamberlain*, 2 Cro. 121; the drain, in *Pyer v. Carter*, 1 Hurlst. & N. 916; the aqueduct, in *Watts v. Kelson*, L. R. 6 Ch. 166; in *Brakeley v. Sharp*, 1 Stock. 9 and 2 Stock. 207; in *Seymour v. Lewis*, 2 Beas. 439, and in *Tooth v. Bryce*, 5 Dick. Ch. Rep. 589, were all buried beneath the surface and not visible to the casual observer, and yet the easement in each case was upheld. The point of actual appearance to the eye was distinctly raised in *Pyer v. Carter*, and overruled. There, as here, the two dwellings were under one roof, and once had a common owner, and had a drain in common for the use of both, which was not visible. Baron Watson, in his considered judgment, used this language: "We think it was the defendant's own fault that he did not ascertain what easements [the drain] the owner of the adjoining house exercised at the time of the purchase." Although this case has been severely criticised as to the main ground upon which it was decided, the part of it just quoted has not been questioned, and the general result was undoubtedly right. See *Tooth v. Bryce*, 5 Dick. Ch. Rep. 599.

It is true that, in each of the cases of aqueducts above cited, both ends of the pipe — as well that from which the flow of water came as that to which it was carried — were probably visible, while here only that end was visible which was on the dominant tenement; but I am of

the opinion that where, as here, and in *Tooth v. Bryce*, the dominant tenement is conveyed and the servient tenement is reserved, the controlling fact is that the existence of the *quasi*-easement is shown by something in sight upon the dominant tenement. That is the point to which the attention of the purchaser is naturally directed; and the principle upon which the cases go is that he is entitled to the tenement he buys in its then present condition, and the use of all such easements as are apparent and continuous. Now, the easement which he sees on the tenement which he buys must be held to be apparent.

It seems to me that, in *Tooth v. Bryce*, the result must have been the same if the ram which drove up the water to the tenement conveyed to the complainant, had been entirely invisible.

In the case in hand the controlling fact is that the pump was there visible and in use, and by its connection with the invisible pipe leading to some fountain the house conveyed to complainant was supplied with water.

This view must hold if the defendant's tenement had been retained by Mrs. Mabey and the action were against her instead of Mrs. Peterson; and, according to the well-settled rule in this court, the result would be the same if Mrs. Mabey had conveyed to Mrs. Peterson and retained the lot conveyed to complainant, provided Mrs. Peterson had notice of the actual fact that the pump on the lot retained was supplied by water from a well which might prove to be on the lot conveyed (see the cases on this point in *Tooth v. Bryce*); and provided, of course, the easement had the other elements requisite, viz., that of being continuous and necessary in the qualified sense in which that word is used in that connection. In short, in my opinion all that is meant by "apparent," in that connection, is that the parties should have either actual knowledge of the *quasi*-easement or knowledge of such facts as to put them upon inquiry.

Next, as to the quality of being "continuous." Mr. Gale, in the later editions of his book — §§ 50, 52 (4th Eng. ed., 1868, pp. 87, 89) — comes to the conclusion that the test of continuousness is that there should be an alteration in the quality — or "disposition" — of the tenement, which is intended to be, and is, in its nature, permanent, and gives the tenement peculiar qualities, and results in making one part dependent, in a measure, upon the other. It is not of the essence of this test, as applied to a watercourse, that the water should flow of itself continuously, but the test is that the artificial apparatus by which its flow is produced is of a permanent nature. It is with a view of bringing out this quality of permanence that the learned author contrasts this class of easements with a right of way, "the enjoyment of which depends upon an actual interference of man at each time of enjoyment." Now, what is meant by that sentence is that the burthen of the easement in the case of a right of way is not felt by the servient tenement except at the moment of each enjoyment of it. A permanent structure upon, or alteration of, the servient tenement is not a neces-

sary element of such an easement. And by the expression "interference of man at each time of enjoyment" is meant no more than an interference with the servient tenement by an entry upon it, as illustrated not only by ordinary rights of way, but also by rights of way with a right to take something from the servient tenement, as in *Polden v. Bastard*, 4 Best & S. 257; L. R. 1 Q. B. 156.

I stop here to say that the distinction between a watercourse and a formed and metaled road constructed for permanent use is quite thin, and there have been expressions of judges in modern times intimating an inclination to hold that where a dwelling or other such tenement is conveyed with an artificially-formed road leading to it over other lands of the grantor which are reserved, a right of way ought to be held to pass.

The true distinction between a continuous and a non-continuous easement is again illustrated by the case of the rain-water drain in *Pyer v. Carter*, through which the water actually ran only when it rained, and yet it was held continuous because it was permanent and constituted a permanent alteration in the structure of the tenement. Suppose that in that case it had been necessary for the plaintiff on each occasion of a rain to pump the rain-water from a pit in his cellar into the drain, would it have been, by reason of that arrangement, any the less continuous? I think not. In short, I conclude that the word "continuous" in this connection means no more than this—that the structure which produces the change in the tenement shall be of a permanent character, and ready for use at the pleasure of the owner of the dominant tenement without making an entry on the servient tenement. In *Seymour v. Lewis*, *supra*, although the water did run by gravity, the head was so small that a sufficient supply could not be procured without the use of a pump, and a pump was in actual use; and yet that did not destroy the continuous character of the easement.

For these reasons I conclude that the easement here in question is both apparent and continuous. That it was "necessary" in the sense in which that word is used in this connection is undeniable.

In this case there is no room for the application of the distinction, even if that distinction were recognized by this court, between the *reservation* and the *grant* of an easement of this character upon the severance of the tenement. The conveyances from the original proprietor, which produced the severance, were simultaneous, and amounted, under the circumstances, to a voluntary partition between complainant and defendant. In such a case, as shown by Chancellor Williamson, in *Brakeley v. Sharp*, 2 Stock. 207, the rule that a man cannot derogate from his own grant does not apply.

I conclude that the complainant is entitled to the relief prayed for, and will so advise.¹

¹ As to what easements are continuous and apparent, see *Kieffer v. Imhoff*, 26 Pa. 438 (1866); *Fetters v. Humphreys*, 19 N. J. Eq. 471 (1868); *Parsons v. Johnson*, 68 N. Y. 62 (1877); *Kelly v. Dunning*, 43 N. J. Eq. 62 (1887); *Baker v. Rice*, 56 Ohio St. 468 (1897).

HILDRETH v. GOOGINS.

SUPREME JUDICIAL COURT OF MAINE. 1898.

[Reported 91 Me. 227.]

On motion and exceptions by defendant.

The case appears in the opinion.

G. F. and Leroy Haley, for plaintiff.

J. B. Donovan and S. M. Came, for defendant.

STROUT, J. The controversy in this case, is whether there is a right of way from the lot of land occupied by the defendant at Old Orchard as tenant of the heirs of William Emery, over and across the plaintiff's land to the street, as appurtenant to defendant's lot. At the trial below the right of way was claimed first by deed, second by prescription, and third by necessity. The evidence failed to sustain either of the first two claims and they are abandoned here. But it is strenuously contended that a way of necessity exists from defendant's lot, across that of plaintiff.

Lawrence Barnes on June 15, 1871, owned in one tract the land, part of which is now owned by the plaintiff, and part by the heirs of William Emery. On that day he conveyed to one Seavey that part of the land now occupied by defendant. William Emery derived title under this deed through mesne conveyances. Barnes' deed to Seavey did not contain any grant of a right of way across Barnes' remaining land. Plaintiff derives his title through deed from Barnes to Francis Milliken, dated October 16, 1879, and mesne conveyances. The land owned by the Emery heirs is bounded on one side by the ocean. No access to it from the street can be had, except by the ocean or crossing land of other owners. Under these circumstances it is claimed that the conveyance by Barnes to Seavey implied a grant of a way over and across the plaintiff's lot, then owned by Barnes, as appurtenant to defendant's lot.

"Implied grants of this character are looked upon with jealousy, construed with strictness, and are not favored, except in cases of strict necessity, and not from mere convenience." *Kingsley v. Land Improvement Co.*, 86 Maine, 280. In that case it was held by this court, that as free access to the land over public navigable waters existed, a way by necessity over the grantor's land could not be implied. The same rule applies here. Defendant's land borders on the ocean, a public highway, over which access to her land from the street can be had. It may not be as convenient as a passage by land, but necessity and not convenience is the test. *Warren v. Blake*, 54 Maine, 276; *Dolliff v. B. & M. E. R.*, 68 Maine, 176; *Stevens v. Orr*, 69 Maine, 324. There is no evidence in the case that the water way is unavailable. The court instructed the jury that the ocean was

a public highway, and to a question by a juror, "whether the ocean was a public highway, if it was not available, and whether it was for the jury to decide whether it is available in the present case," the court replied, "that if there was any evidence as to availability it was for them to decide; but if there was no evidence, they must assume that it was available." They were further instructed "that cases must be decided upon the evidence introduced, and not with reference to any individual knowledge that any juror may have, and I give now the general instruction that, nothing appearing to the contrary, the ocean is a highway."

Exception is taken to these instructions. But they are so clearly in consonance with well-established principles, and the decisions of this court, that it is unnecessary to discuss them. *Kingsley v. Land Improvement Co.*, supra; *Rolfe v. Rumford*, 66 Maine, 564.

We perceive no reason for disturbing the verdict, upon the motion.

*Motion and exceptions overruled.*¹

¹ "The instruction on this subject was, 'that the deed under which the plaintiff claimed conveyed whatever was necessary to the beneficial enjoyment of the estate granted, and in the power of the grantor to convey; that it was not enough for the plaintiff to prove that the way claimed would be convenient and beneficial, but she must also prove that no other way could be conveniently made from the highway to her intestate's house, without unreasonable labor and expense; that unreasonable labor and expense means excessive and disproportionate to the value of the property purchased; and that it was a question for the jury, on all the evidence, whether such new way could be made without such unreasonable labor and expense.'

"The court are of opinion that this instruction was correct. The word 'necessary' cannot reasonably be held to be limited to absolute physical necessity. If it were so, the way in question would not pass with the land, if another way could be made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but one thousand dollars, it would follow from this construction that the plaintiff's intestate would not have the right of way over the triangular piece as appurtenant to the land, provided he could have made another way at an expense of one hundred thousand dollars. If the word 'necessary' is to have a more liberal and reasonable interpretation than this, the one adopted by the judge must be regarded as correct. Its effect was, to require proof that the way over this triangular piece was reasonably necessary to the enjoyment of the dwelling-house granted. See *Ewart v. Cochrane*, 7 Jur. N. S. 925; *Leonard v. Leonard*, 2 Allen, 543; *Carbrey v. Willis*, 7 Allen, 364.

"As the facts were properly submitted to the jury, and evidence was admissible as to the consideration paid for the land and the cost of making a way, it was proper that the jury should compare the facts together and make such inferences as they should think reasonable. The instruction on this point was correct." — *Pettingill v. Porter*, 8 All. 1, 6, 7 (Mass. 1860). See also *Nichols v. Luce*, 24 Pick. 102 (Mass. 1834).

SECTION II.

BY REFERENCE TO PREVIOUS USE.

SAUNDEYS v. OLIFF.

QUEEN'S BENCH. 1597.

[Moore, 467.]

[See this case given on page 345, *ante*.]

WORTHINGTON v. GIMSON.

QUEEN'S BENCH. 1860.

[Reported 2 E. & E. 618.]

THE declaration stated that plaintiff was possessed of a messuage, farm, buildings, garden, and land, with the appurtenances, and by reason thereof was entitled to a way from the said messuage, &c., unto, into, through, over, and along certain land of defendant, for plaintiff and his servants, &c., yet defendant obstructed the said way.

Pleas. 1. Not guilty. 2. That plaintiff was not by reason of his possession of the said messuage, farm, buildings, garden, and land, with the appurtenances, entitled to the alleged way in the declaration mentioned, in manner and form as alleged.

Issues thereon respectively.

At the trial before *Williams, J.*, at the Leicestershire Summer Assizes, 1859, it appeared that the plaintiff was the occupier of a farm and house at Naneby, a hamlet of Market Bosworth, in the county of Leicester; and that he also occupied therewith two closes in the adjoining parish of Newbold Vernon. These two closes adjoined part of a farm occupied by the defendant under Sir W. Hartopp, and situated in Newbold Vernon. The way mentioned in the pleadings passed from the plaintiff's farm buildings across one of his said closes in Newbold Vernon, and then across the farm of the defendant. It was proved that the way had been used by the plaintiff and his father, who occupied the farm before him, for more than forty years, and that it had been rendered impassable by an obstruction caused by the defendant in January, 1859. It appeared that, since the date of the partition-deed hereafter mentioned, the owner of the farm occupied by the defendant had been only a tenant for life. For many years prior to January, 1820, the owners of the two farms had been jointly interested in them, the late Sir E. C. Hartopp being seised of one undivided moiety, and the late Mr. John Pares of the other. In January, 1820, a partition

deed was entered into between Sir E. C. Hartopp and Mr. John Pares, whereby the Newbold Vernon portion of the land, with the exception of the two closes before referred to, were conveyed to the use of the Hartopp family, and the Naneby portion, together with the said two closes, were conveyed to Mr. John Pares absolutely. The last-mentioned estate came by sale into the possession of one Harris, who was the owner of it at the time this action was brought. The way had existed and had been used for many years by the occupiers of either farm; but there was no express reservation in that part of the partition deed by which Mr. Pares granted his undivided moiety. The grant by the same deed, by Sir E. C. Hartopp, of his undivided moiety in the Naneby estate to Mr. Pares, conveyed, with other farms, that occupied by the plaintiff, "with their and every of their rights, members, easements, and appurtenances." The jury found that the occupiers of the Naneby farm had enjoyed the way as of fact up to and before the deed of partition, and also that the way had been enjoyed for twenty years since the partition-deed up to the time of the obstruction. The learned judge, notwithstanding this finding, nonsuited the plaintiff, reserving to him leave to move that the verdict should be set aside, and a verdict with nominal damages entered for him instead thereof.

Mellor obtained a rule to that effect.

Macauley and *Phipson* now showed cause.

Mellor and *Field* in support of the rule.

CROMPTON, J. I am of opinion that my Brother Williams was quite right at the trial, and that we cannot enter the verdict for the plaintiff upon the findings of the jury. We are asked to do so upon the finding that there had been an actual use of the way, up to the time of the partition; although it is not found that the way was used of necessity. Mr. Gale, in his work on Easements, states very clearly the class of easements which pass by implication. At page 76 (3d ed.) he says, "Where such easements are in their nature continuous and apparent, they pass upon a severance of the tenements by implication of law, without any words of new grant or conveyance. Indeed properly speaking, such easements are not revived, but newly created, by an implied grant." "The same observation applies to easements, commonly called 'of necessity.'" He adds: "Other easements, such as ordinary rights of way, will not pass upon a severance of the tenements, unless the owner 'uses language to show that he intended to create the easement *de novo*.'" The last words of this passage are those of Bayley, B., in *Barlow v. Rhodes*, 1 C. & M. 448; in which case a question was raised, which does not here arise, whether parol evidence was admissible in explanation of the terms of a deed of grant. We are also asked to say that the way in dispute in the present case passed under the word "appurtenances" in the deed of January, 1820. But in *James v. Plant*, 4 A. & E. 749, which is relied upon in support of that contention, language was used in the deed of par-

tition which showed that the intention of the parties was that the way should pass, and the court held that the subsequent general word "appurtenances" might be properly construed in a sense wide enough to give effect to that intention. In the present case the parties have not used apt words in the deed to express an intention to pass the way in dispute, and the general words which follow the description of the property intended to be conveyed do not add to or alter the previous words of conveyance. It is said that this way passed, as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, the right to which must pass, when the property is severed, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say, from the nature of a road, whether the parties intended the right of using it to pass. It may, besides, be very naturally supposed to have been the intention of the parties that, on the partition of the property, all ways not incident to the separate enjoyment of each of the severed portions should cease.

HILL, J. I am of the same opinion. I found my judgment upon this, that there is nothing in the deed to indicate that the parties intended to use the word "appurtenances" in any other than the strict legal sense of the word; and that the right of way claimed by the plaintiff is not within that sense.

*Rule discharged.*¹

KAY v. OXLEY.

QUEEN'S BENCH. 1875.

[*Reported L. R. 10 Q. B. 300.*]

CASE stated by an arbitrator, after verdict, taken by consent, for the plaintiff.

The action was brought to try the right of the defendant to obstruct a way which the plaintiff claims a right to use over defendant's land for certain purposes.

The following are the material parts of the case:—

On and previous to the 1st of May, 1860, the defendant was the owner in fee of a dwelling-house, together with the cottage, stable, outbuildings, and garden thereto belonging, now the property of the plaintiff, and called "Roseville," situate at Roundhay, in the parish of Barwick in Elmet, in the county of York, abutting upon a public

¹ See *Grymes v. Peacock*, 1 Bulst. 17 (1610); *Clements v. Lambert*, 1 Taunt. 205 (1806); *Whalley v. Tompson* (under a will), 1 B. & P. 371 (1799); *Pelden v. Bastard* (under a will), 4 B. & S. 258, L. R. 1 Q. B. 156 (1865); *Hall v. Byron*, L. R. 4 Ch. D. 667 (1876).

highway called Horse Shoe Lane, leading from Leeds to Seacroft; and defendant was also the owner in fee of an adjoining farmstead and farm called Rose Cottage Farm, abutting also upon the same highway, and having a private farm road leading from it to the farm buildings, stack-yard, and other premises connected therewith, and to a field adjoining them.

By an indenture of lease, dated the 1st of May, 1860, defendant demised Roseville to R. J. Hudson for a term of ten years from that date, together with "all and singular the rights, privileges, easements, advantages, and appurtenances whatsoever to the said messuage and premises thereby demised, belonging, or in anywise appertaining or therewith used or enjoyed."

At the time of the demise the stable had no upper story, and was of the same height as the adjoining cottage demised with it.

Hudson entered at once into possession, and in the same year built at his expense a hay chamber or upper room over the stable, with two square openings in the east wall of the chamber, of the respective dimensions of 4 ft. 7 in. by 2 ft. 1 in., and 2 ft. 10 in. by 2 ft. 10 in., for the purpose of getting his corn, hay, and straw into his hay chamber, and for which purpose they were adapted. Both openings were fitted with shutters, and the shutters to one of them opened outwards. There were no other means for the admission of light and air into the chamber except a man-hole, 2 ft. 6 in. by 2 ft. 1 in. square, cut through the south-east corner of the floor.

The east wall and the openings abutted upon and looked into the stack-yard and adjoining premises of Rose Cottage Farm; and there was no access to them with carts and wagons out of any part of the premises demised to Hudson, and the only way by which carts and wagons could be brought up to them was by taking them along the private farm road of Rose Cottage Farm.

Before making these alterations, Hudson consulted the defendant and Robert Barber, who was then the defendant's tenant of Rose Cottage Farm, upon them, and obtained their consent to them, and, at the same time, their permission to use Rose Cottage Farm private road to get to the hay chamber, when completed, with his cart and wagon loads of hay, corn, and straw.

No openings were made in the opposite or west wall of the hay chamber.

The lessee Hudson remained in occupation of Roseville and premises until about March, 1863, when he sublet them to a Mrs. Fletcher, who remained in occupation twelve months; and on her quitting them, Hudson sublet them to Richard Green, who remained in occupation up to the expiration of the aforesaid lease of 1860, and was in actual occupation and using the defendant's farm road, as Hudson had done, to get hay and corn into the hay chamber, at the time when the plaintiff purchased from the defendant, as hereinafter mentioned.

In 1868, the defendant entered into the occupation of Rose Cottage

Farm himself, and has continued to occupy it to the present time, having a bailiff residing in the farmstead; and he has been all along and still is the owner of it.

All the time Hudson and his under-tenants were in occupation of Roseville they respectively used the defendant's private farm road with their carts and wagons to get their hay, corn, and straw into the hay chamber, and were never interrupted or interfered with by the defendant or his tenants or servants.

The permission which the defendant gave to his lessee Hudson before building the hay chamber was never withdrawn, but on a few occasions the servants of Hudson and Green asked permission of the defendant's tenant and bailiff to use the road.

In May, 1870, the plaintiff agreed with the defendant to purchase Roseville; and by a conveyance dated the 2d of August, 1870, defendant conveyed to plaintiff in fee "all that messuage or dwelling-house, with the outbuildings, conservatory, gardens, and pleasure grounds thereto belonging, called Roseville, situate at Roundhay, in the parish of Barwick in Elmet, in the county of York, and abutting upon Horse Shoe Lane, leading from Leeds to Seacroft; And all that cottage, stable-yard, outbuildings, and close of land adjoining the said messuage or dwelling-house; Together with all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, and rights of way, waters, watercourses, drains, cisterns, lights and rights of light, liberties, privileges, easements, advantages, and appurtenances whatsoever to the said messuage or dwelling-house, cottage, land, and hereditaments, or any of them, appertaining, or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto."

At the time of the conveyance the hay chamber, with the two openings in the east side, stood precisely as it had been erected by Hudson.

The plaintiff entered into possession, and began at once to use the defendant's farm road to bring his carts and wagons up to the openings in the hay chamber, and so to get his hay and straw into the chamber, and continued to do so without interruption up to May, 1873, when, and ever since, he has been refused the use of the road by the defendant.

As things were at the time of the purchase by the plaintiff and now are, the plaintiff had not, nor has he now, any way of putting hay, corn, and straw into his chamber except by using the defendant's farm road, or incurring expense in the necessary alteration of his buildings and premises which he purchased from the defendant.

The question for the court was, whether the plaintiff has a right of way over the defendant's private farm road to and for the use of his hay chamber for the purposes mentioned or any or either of them, either by virtue of or ancillary to the conveyance of 1870.

J. W. Mellor (*Dugdale* with him), for the plaintiff.

Herschell, Q. C. (with him *W. J. E. Bennett*), for the defendant.

BLACKBURN, J. I think when we come to understand this case that the plaintiff is entitled to the right of way. The facts are these: the plaintiff purchased Roseville of the defendant, and the defendant by the deed conveyed to the plaintiff the lands and hereditaments, together with all, &c. [The learned judge read the clause.] It is not disputed that if the conveyance had stopped at the word "appertaining," the plaintiff's case might not have been sustainable, but it goes on to add the words: "or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto." We have now to look at the facts in order to see whether the particular right of way in question was in fact occupied or enjoyed or reputed as appurtenant to Roseville. Mr. Herschell says that, where a man is occupier of two adjoining pieces of land, and uses both for the convenience of himself as the actual occupier of both, anything that he may do on the one is *prima facie* not a right appurtenant to the other, and would not pass as appurtenant; and that when he passes across the one close to the other, he exercises the right of going from one to the other merely for his convenience as occupier of the two, and that he does not *prima facie* enjoy or occupy the way as appurtenant to the other, and that the way would not pass as a right enjoyed or as appurtenant. But though that may *prima facie* appear to be the case; yet if there be acts of ownership and user of a road by a man across land for the enjoyment and exclusive convenience of himself as occupier of the adjoining lands, notwithstanding the cases cited, I do not think, in point of law, we can say that the fact of the road having been so enjoyed and occupied only during the time he had unity of possession or unity of seisin prevents it being enjoyed as appurtenant.

The first case relied on for the defendant is *Thomson v. Waterlow*, Law Rep. 6 Eq. 36, 41, before the late Master of the Rolls; and I cannot help thinking that he must have been misunderstood. He is reported to have said: "There is, as it appears to me, a distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way which, previously to such unity of possession, existed from one close to the other, and which has become merged by the fact of the same person having become the owner of both properties." I quite agree that there is a distinction. The way which had existed previously to the unity of possession, and which still continued to exist, is obviously one to be used and enjoyed as appertaining to the other premises. In the case of the other way it would require to be seen whether it had been so used and enjoyed. Then the Master of the Rolls continues: "I do not think that the judges in *James v. Plant*, 4 Ad. & E. 749, intended to lay down that such words of conveyance as were used in that case and in the present would constitute the grant of a right of way, where the user had sprung solely from the convenience of the person who held both tenements, which convenience ceased to exist when the severance between

the closes took place." Taking that as the rule to be applied as to matter of fact, I think it is a sound one. I think whenever it appears that an alleged right of way had been used for the convenience of the person who held both tenements, which convenience ceased to exist when a severance took place, it is a good rule to adopt to say that the way was not used or enjoyed as appurtenant to the premises — it was used for the convenience of the man who was the occupier of the two, and when he ceases to be the occupier of the two, I think it is no longer appurtenant. That, I think, is a sound rule. And though the facts of the case before the late Master of the Rolls are not set out, I presume they were such as to show that the right of way said to pass was for the convenience of the person so long as he was the occupier of the whole premises to which and over which the way went. Looking at it in that view, it would seem to have been a sound enough decision.

In *Langley v. Hammond*, Law Rep. 3 Ex. 168, the Lord Chief Baron is reported to have laid it down as matter of law: "Since it does not appear here that at any antecedent time," that is, before the unity of possession, "there existed a right over one of these pieces of land attached to the other piece of land, the effect of these words" (together with all ways used or enjoyed therewith) "cannot make or revive a right of way that never before existed." And then he goes on to cite what I have read from the judgment of the Master of the Rolls in *Thomson v. Waterlow*, Law Rep. 6 Eq. 41. No doubt the Lord Chief Baron so lays down the law; and if that had been the decision of the Court of Exchequer, we should have been bound by it, and we must have left the question whether it was right or no for the Court of Error. But I cannot agree that, upon the construction of words like those in the conveyance here in question, they cannot as a matter of law create a right of way that did not previously exist as a right. If the words, as my Brother Lush suggested in the course of the argument, had been "together with the right of way which Green *de facto* has enjoyed of passing over the private farm road," supposing that had been a right of way never enjoyed as of right, but merely a way *de facto* used, still I think the words would have clearly enough created a right of way. I quite agree, where there is a track across the middle of a stack-yard, and the owner sold one side of the stack-yard to enable the purchaser to throw it into his pleasure-grounds, that track across the middle of the stack-yard would not, to use the words of the Master of the Rolls, be a right of way appurtenant to every portion of the stack-yard, but a right of way solely for the convenience of the person who held the whole stack-yard, and which convenience ceased to exist when he severed one part of the stack-yard from the other. That is a good and sound distinction, and taking it in that way, which is the point Martin, B., went upon, I think the decision is perfectly good and right. As to the Lord Chief Baron's *dictum*, I do not think that what the Master of the Rolls said amounted to so much; but if it did, we have the *dicta* of the Lords Justices

James and Mellish in *Watts v. Kelson*, Law Rep. 6 Ch. Ap. 172, 174, showing that they do not agree in the doctrine. It cannot make any difference in law, whether the right of way was only *de facto* used and enjoyed, or whether it was originally created before the unity of possession, and then ceased to exist as a matter of right, so that in the one case it would be created as a right *de novo*, in the other merely revived. But it makes a great difference, as matter of evidence on the question, whether the way was used and enjoyed as appurtenant.

We have now to apply this to the facts of the present case. As a matter of evidence we find it stated in the case that Hudson, the then tenant of Roseville, who held on a lease for ten years, made a hay-loft, with two large openings to admit the hay, which could not be used except by bringing the hay in carts below them along the farm road, and these openings, though not absolutely essential to the use of the hay-loft, were extremely important and material for the use of it. Before Hudson built the loft and made these openings, he applied to the defendant, the freeholder of the farm and landlord of Roseville, and obtained his consent to the alterations being made; and at the same time Hudson asked and obtained leave to use the private farm road in question to get the hay and straw in carts to his hay chamber. Hudson remained in occupation of Roseville until March, 1863, when he sublet to Mrs. Fletcher, who remained in occupation twelve months; and on her quitting, Hudson sublet to Green, who remained in occupation up to the expiration of the lease, and was in actual occupation and using the defendant's farm road as Hudson had done, to get hay, straw, and corn into the loft, at the time when the plaintiff purchased Roseville from the defendant. I do not think it necessary to consider whether or not that parol license, which was given by the defendant to use the road, was revocable; or whether an action might not have been maintained for obstructing the tenant in doing that which he had a parol license to do; or whether an action of trespass could have been brought against the tenant for using that road. I do not think it material to decide that. The license was not in fact revoked. The tenant for the time being of Roseville continued to use the road as appurtenant to it, and had the apparent necessity of using it for the purpose of getting to the two large openings in the loft, exactly in the same way as if the consent of the defendant had been in writing, and a wafer stuck on it. There would not have been the slightest difference in the use and enjoyment of the road. In the one case it would have become appurtenant, and in the other case it would only have been enjoyed as if it were appurtenant. I think in considering the words, we should see what they really mean, and apply them to the state of circumstances existing at the time of the conveyance; and I think this right to carry hay and straw to these two openings was in point of fact then occupied, and enjoyed, and reputed as appurtenant to these premises; and therefore that the plaintiff is entitled to judgment.

LUSH, J. I am of the same opinion. The only question is whether the words of this conveyance manifest an intention that the mode of access which had been used by the tenant of Roseville to the hay loft for the purpose of conveying fodder there, should pass to the plaintiff under that conveyance as a right of way. It is beyond doubt, as a fact, that during the subsistence of the lease, the tenant and his successors had used this way for the purpose of conveying hay and straw, &c., to the hay loft. It was the only mode of access to these openings, and it existed up to the time when the purchase was made by the plaintiff. The conveyance of the house and stable, together with the other premises, has these words, "Together — [The learned judge read the clause]. The latter words were clearly intended to pass, if there were any such thing enjoyed, something not strictly appurtenant to the premises, which could not have been claimed as a matter of right without these larger words. Applying that to the facts as they existed at the time of the conveyance, there was a way which had been used by the tenant for the time being as a mode of access to a part of the premises, namely, the hay loft, and which had been used and enjoyed as if that way had been appurtenant to it, and the language used, I think, expresses, when you come to apply it to the facts, the intention to pass this right of way as specifically as if the conveyance had said "including all the ways and easements to the hay loft as the same have been heretofore enjoyed by Green." That undoubtedly would have passed this way. I certainly was struck with the observation of Mr. Herschell, that in none of the reported cases does it appear that the way claimed and held to pass had been newly created as a right by the deed in question. Mr. Herschell says that in all the cases it appears (and certainly the note in 2 Wms. Notes to Saund. p. 809 n. (c) does justify that position) that there had been originally a right of way appurtenant to the premises which had been suspended, but not extinguished by unity of possession; and the question in all the cases was whether the general words used in the conveyance were intended to revive the right. I certainly was struck with that observation, because I have an impression even now, that there are cases to be found in which rights of way have been thus created by deed. But however that may be, I cannot see anything to prevent the acquisition of such a right by the words used in the present instance. I do not think that we are at all acting in conflict with the decision of the late Master of the Rolls in *Thomson v. Waterlow*, Law Rep. 6 Eq. 36. That case is obscurely stated, but I collect from the terms of the judgment that there had been no specific defined portion of the soil appropriated by the owner as a roadway to the severed property as appurtenant to it, but that he had been used to ride across one field in any direction he thought proper in order to get to another field. As to the case in the Exchequer of *Langley v. Hammond*, Law Rep. 8 Ex. 161, 168, 170, I think that case is rightly decided, although not on the ground put by the Lord Chief Baron. I prefer the ground on which my Brother Bram-

well puts it. Looking, therefore, at the language used, I think it was intended to grant this right of way or access to the hay loft, just as if it had been expressed in terms that it was intended to pass the use of the road as the access to the hay loft, as it had been enjoyed by Green, who had held the premises up to the time of the conveyance.

BLACKBURN, J. With regard to the observation on the older cases, I may add that in *Kooystra v. Lucas*, 5 B. & Al. 880, page 883, it does not appear affirmatively whether the right of way claimed had or had not been created before. The judges make no mention one way or the other; but the Chief Justice's direction was that the plaintiff was entitled to the right of way claimed for his cattle to the spot of ground on which he had built his stable and coach-house, "that being a part of the demised premises to which such a way had been used previously to 1814," the date of the conveyance. It might have been that the right of way existed before the unity of possession, but that is certainly not stated affirmatively. *Judgment for the plaintiff.*¹

SECTION III.

BY WORDS OF RESERVATION OR EXCEPTION.

150 WICKHAM v. HAWKER.

EXCHEQUER. 1840.

[Reported 7 M. & W. 63.]

PARKE, B.² This case was tried before my Brother Coleridge, at the last Summer Assizes at Winchester, when several points were reserved, which were fully argued before my Brothers Alderson, Gurney, and myself, at the sittings after Hilary Term.

It was an action of trespass *qu. cl. fr.* against the defendant Hawker and two others, for entering the plaintiff's closes, and hunting and searching for and killing game.

The special pleas were, first, that Vidler and Cox were seised of the manor of Bullington, in trust for Widmore, and that Widmore, Vidler, and Cox, by an indenture, in 1712, between them and Wade, and sealed by Wade, released parcel of the demesne lands of the manor of Bullington, comprising the *locus in quo*, to Wade, "excepting and always reserving to Widmore, Vidler, and Cox, their heirs and assigns, liberty, with servants or otherwise, to come upon the lands so conveyed, and there to hawk, hunt, fish, and fowl at any time thereafter,

¹ See *Bradshaw v. Eyre*, Cro. El. 570 (1597); *Worledg v. Kingswel*, Cro. El. 794 (1598); *Barkshire v. Grubb*, L. R. 18 Ch. D. 616 (1881).

² The statement of facts is omitted, and part only of the opinion given.

at their will and pleasure: and the said John Wade did thereby grant to Widmore, Vidler, and Cox, their heirs and assigns, the said liberty so excepted and reserved." The plea then states a release and conveyance from Vidler and Cox to Widmore of the manor and liberty, and deduces from him a title to both to the defendant Hawker, and he and the others, as his servants and in his company, justify the trespasses by virtue of the liberty.

The second special plea states, that the occupiers of the manor had used and enjoyed, and Hawker as such occupier was entitled to use and enjoy, the right of hunting, hawking, and fowling, for sixty years, by themselves and with servants.

The replication to the first plea takes issue on the allegation of a grant. That to the second denies the user and enjoyment. There was a new assignment of the trespasses committed by the two other defendants, by command of Hawker in his absence, in hunting, &c.; and pleas to the new assignment, — first, a reservation and grant of a liberty, in the like terms and by a similar deed to that in the second plea, to hunt, &c. *by* servants; secondly, a similar plea to the third, of sixty years' user, by the occupier and *by* servants.

The replication to the first plea to the new assignment denied the grant; to the second, denied the user and enjoyment.

The principal questions in the case were, how the issues raised by the replication to the first special plea to the declaration, and the first plea to the new assignment, ought to be found; and that depends upon the legal effect of the deed of 1712.

The liberty "of hawking, hunting, fishing, and fowling," is, by the terms of that deed, "excepted and reserved to Widmore, Vidler, and Cox;" but so far as related to Widmore it could not be a good exception or reservation, because he was not a conveying party to the deed; nor is such a liberty, whether it be a mere easement or a profit *à prendre*, properly and in correct legal language, either an exception or a reservation. This point was expressly decided in the case of *Doe d. Douglas v. Lock*, 2 Ad. & Ell. 743, where most of the authorities were cited and fully considered. Lord Denman, in delivering the judgment of the court, says, "that the privilege of hawking, hunting, fishing, and fowling is not either a reservation or an exception in point of law; it is only a *privilege* or *right granted* to the lessor, though words of reservation and exception are used." As the indenture was executed by Wade, the words of reservation and exception operated as a grant by him to the three — Widmore, Vidler, and Cox, and the plea properly stated the legal effect of those words as a grant by him. Consequently this issue ought to have been found for the defendant, and the verdict must be entered accordingly.¹

¹ "The rent, heriots, suit of mill, and suit of court, are the only things which, according to the legal sense and meaning of the word, are *reservations*. For we are of opinion, that what relates to the privilege of hawking, hunting, fishing, and fowling, is not either a reservation or an exception in point of law; and it is only a *privilege* or *right*

BOWEN v. CONNER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1850.

[Reported 6 Cush. 182.]

THIS was an action on the case for obstructing a right of way, claimed by the plaintiffs over a strip of land lying on the westerly side of land of the defendant on Pine Meadow Street, in Worcester, and extending from the same to land of the plaintiffs. The obstruction complained of was the maintaining and continuing of a house thereon.

The parties submitted the case upon the following statement of facts:—

On the 9th of March, 1849, the plaintiffs and the defendant were tenants in common of an estate on Pine Meadow Street, there measured to the lessor, though words of *reservation* and *exception* are used. And we think, that what relates to the wood and the underground produce is not a *reservation*, but an *exception*. Lord Coke, in his Commentary on Littleton, 47 a, says, 'Note a diversity between an exception (which is ever of part of the thing granted, and of a thing in *esse*), for which, *exceptis, salvo, præter*, and the like, be apt words; and a reservation which is always of a thing not in *esse*, but newly created or reserved out of the land or tenement demised.' In Sheppard's Touchstone, p. 80, 'A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, &c., doth reserve some new thing to himself out of that which he granted before:' and, afterwards, 'This doth differ from an exception, which is ever of part of the thing granted, and of a thing in *esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not in *esse* before; so that this doth always reserve that which was not before, or abridge the tenure of that which was before.' And afterwards, 'It must be of some other thing issuing, or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing.' And afterwards, 'If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing; this is a good reservation: but if the reservation be of the grass, or of the vesture of the land or of a common, or other profit to be taken out of the land; these reservations are void.' In Brooke's Abridgment, title Reservation, pl. 46, it is said, that if a man leases land, reserving common out of it, or the herbage, grass, or profits of the land demised, this is a void reservation, for it is parcel of the thing granted, and is not like where a man leases his manor and the like, except White Acre, for there the acre is not leased; but here the land is leased; therefore the reservation of the herbage, vesture, or the like, is void. It must be observed, however, that, though in Co. Lit. 47 a, the distinction between a reservation and an exception is pointed out, yet in p. 148 a, speaking of the word *reservation*, Lord Coke says, 'Sometime it hath the force of *saving* or *excepting*. So as sometime it serveth to reserve a new thing, viz., a rent, and sometime to except part of the thing in *esse* that is granted.' He does not, however, go on to illustrate that position; and as, only two pages before, in 142 a, he had said to the same effect as he had done in the former reference in 47 a, that 'a man upon his feoffment or conveyance cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land or the like, for that should be repugnant to the grant,' we cannot take this language of Lord Coke in 148 a, as identifying an exception and a reservation.

"There are, however, some cases reported, where, in the language of the court, the word 'reserve' is treated as meaning 'exception,' as in Dyer, 19 a, Pl. 110. That, however, is only general language; and it does not make them the same in point of law. In the very late case of *Fancy v. Scott*, 2 Man. & Ry. 335, the defendant pleaded that the plaintiff was tenant to the defendant of the close in which, &c., subject to a

ing from 100 to 130 feet, and extending back from 300 to 400 feet; the plaintiffs, George Bowen and Horatio A. Tower, owning one half, and the defendant, Conner, the other half, undivided. A division was then made, and the defendant conveyed to the plaintiffs, by deed of quitclaim, all his interest in the northerly part of the estate, and the plaintiffs quitclaimed to the defendant the southerly, being the larger portion of the lot, with the following reservation: "Reserving forever a right of way over a street which the said Conner is to make from the north-west corner of said granted lot to Pine Meadow Road; said street to be thirty feet in width, adjoining the west line of the said granted lot." At the time of the division a dwelling-house extended over a part of the strip, thirty feet in width, over which the right of way was reserved.

The plaintiffs purchased the northerly part of the land, for the purpose of laying out the same, with other land adjoining thereto, into house-lots (though this fact was not mentioned in either of the deeds),

reservation to defendant of all pits in the close, with liberty to carry away the produce of the pits; and Mr. Justice Bayley said it was not a reservation, but an exception, and held the plea bad; and the counsel for the defendant did not further press the argument.

"It may be said, however, that, if the person who creates the power uses the word 'reserving' in such a way as to make an exception a reservation, it must be so taken; but we think not necessarily. Powers in many respects are construed so very strictly, that they must be so throughout.

"But, besides, it is not necessarily to be taken that what relates to the wood and underground produce is a reservation; there are other legal reservations, besides *rent*, to satisfy the words '*rent and reservations*;' and when the testator, in the lease of 1756, mentions wood and underground produce, he says *except and always reserved out of this present demise and grant, all, &c.*; and therefore if, in point of law, the matters are the subject of exception, they must be applied to the legal term used. And in *The Earl of Cardigan v. Armitage*, 2 B. & C. 197, where Sir Thomas Danby enfeoffed the Earl of Sussex of certain closes, *except and always reserved out of the said feoffment to the said Sir Thomas all the coals in all or any of the said lands, together with free liberty to sink and dig pits, &c.*, Mr. Justice Bayley, in delivering the judgment of the court upon the pleadings, says, this constituted an exception; and he states the distinction between an *exception* and a *reservation*, and then he goes on to point out the effect of an exception upon the statement in the pleadings.

"Upon all these authorities, we are of opinion that what is said as to the wood and underground produce is not a reservation, but an exception."—*Per LORD DENMAN*, C. J., in *Doe d. Douglas v. Lock*, 2 A. & E. 705, 743-746 (1835).

"It is to be observed that a right of way cannot, in strictness, be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation. A right of way *reserved* (using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same manner as a right of sporting or fishing, which has been lately much considered in the cases of *Doe d. Douglas v. Lock*, 2 A. & E. 705, and *Wickham v. Hawker*, 7 M. & W. 63. It is not indeed stated in this case that the lease was executed by the lessee, which would be essential in order to establish the easement claimed by the lessors as in the nature of a grant from the lessee; but we presume that in fact the deed was, according to the ordinary practice, executed by both parties, lessee as well as lessors."—*Per TINDAL*, C. J., in *Durham R. R. Co. v. Walker*, 2 Q. B. 940, 967 (1842).

and the street over which the right of way was reserved was the only access to the lots so to be laid out. It also appeared, by reference to a plan, which was made a part of the case, that the whole of the lot divided was so surrounded by lands of other proprietors, that there was no access to any highway from the original lot, but upon the Pine Meadow road.

If the court should be of opinion, that the maintenance and continuance of the dwelling-house, from the date of the deed to the date of the writ, upon the strip of thirty feet, was an obstruction of the plaintiffs' right of way, judgment was to be entered for the plaintiffs, with damages fixed at the sum of ten dollars, otherwise the plaintiffs were to be nonsuit.

B. F. Thomas, for the plaintiffs.

P. C. Bacon and *H. D. Stone*, for the defendant.

SHAW, C. J. This is an action on the case for a nuisance occasioned by the obstruction of a private way, specially described as appurtenant to the land of the plaintiffs.

The question, and the only question argued, does not appear to be the question submitted to the court. The question reserved on the agreed statement of facts is, whether the building described, standing within the limits of the way claimed, was an obstruction. The only question argued was, whether by force and effect of the deeds referred to, and the rules of law applicable to them, the plaintiffs had the right of way which they claim.

The facts are, that the plaintiffs and the defendant were tenants in common of a small parcel of land in Worcester, bounding on one side, on a public highway called Pine Meadow Street, about 100 or 130 feet, and extending back 300 or 400 feet, the plaintiffs owning one moiety and the defendant the other. On the 9th of March, 1849, they made partition by deed. The parties did not join in one deed, but each made a deed to the other. These deeds, bearing the same dates, each reciting that the estate released is part of an estate then held by the parties in common, and each reciting the simultaneous conveyance of the other as a consideration, are to be taken as parts of one and the same transaction, and considered together for the purposes of construction. The plaintiffs took the rear part of the lot as their property, to hold in severalty, and the defendant the front part, probably allowing a larger quantity to the rear lot, as a balance to the greater value, by the superficial foot, of the front lot. In the deed of Bowen and Tower to Conner of the front lot, after the recital and granting part of the deed, is the following clause: "Reserving forever a right of way over a street, which said Conner (the grantee) is to make from the north-west corner of said granted lot to said Pine Meadow Road; said street to be thirty feet wide, adjoining the west line of said granted lot." The question is, whether this secured to the plaintiffs a right of way. As to the nature of that right, if one was well created, considering the circumstances, and construing the deeds together, we think it was a right

secured to the plaintiffs and their assigns, as owners of the rear lot, and therefore was a right of way annexed to the estate before owned in common, but then set off in severalty to the plaintiffs.

It is found in the statement of facts, that the rear land was intended to be used for house-lots; but as that fact is not mentioned in either of the deeds, and remained only in intention, we have placed no stress upon it. There is another consideration, however, of some importance; in referring to the plan, which is made a part of the case, we suppose that the entire land divided was surrounded by land owned by other private proprietors, and that there was no access to any highway from the original lot, but upon the Pine Meadow Road; if such be the case, it would seem that by established principles, the grantees of the interior lot would have had a way of necessity over the front lot, if there had been no specific reservation. This strengthens the conclusion, that it was the intention of both parties, that such a way should be established.

It was argued, that according to the English authorities, an easement, as a way, could not be created by a mere reservation. We have not thought it necessary to review the English authorities minutely on this subject; we know there is much nicety in the technical distinction between an exception and a reservation. Many of the cases in England have arisen upon the execution of powers of leasing, with certain precise reservations enumerated; and the question is, whether the lease made is within the power, which in all such cases is to be construed strictly. In our own conveyancing, this distinction is not so precisely observed, but a clause of reservation is construed to be an exception, if that will best effect the intent of the parties. And so in the English cases, the term reservation is often construed to be a good exception. But the distinction between an exception and a reservation is often very uncertain. *Co. Lit.* 47 a; *Shep. Touch.* 80; 4 Cruise (Greenl. ed.) 271, note 2; *Thompson v. Gregory*, 4 Johns. 81. But in a case like this, the right being established by a formal act, to which all the parties interested were parties and assenting, we consider it immaterial, whether the easement for the way intended to be established is technically considered as founded on an exception, a reservation, or an implied grant.

It seems by the authorities, that, had there been no express reservation in the present case, by necessary implication, the plaintiffs would have had a way as of necessity. But this, by the better authorities, is regarded as a way created by tacit reservation, or exception. *Pomfret v. Ricraft*, 1 Wms. Saund. 321, note 6; *Clark v. Cogge*, Cro. Jac. 170; *Houston v. Frearson*, 8 T. R. 50; Bull. N. P. 74; 3 Kent (4th ed.) 424; 4 Ib. 468; 2 Cruise (Greenl. ed.) 28, 29; *Holmes v. Goring*, 2 Bing. 76. If a way would be established for the grantor, under such circumstances, on the ground, that the law will presume that the grantor intended to reserve or retain to himself a right of way over the land granted, for the use of the estate retained, *a fortiori* shall

the grantor be entitled to that right, when the intent is expressed by the grantor, and the grantee by accepting the deed with such a clause inserted assents to it.

Even if these two deeds were not to be construed together, as an indenture, there is abundant authority to show, that the grantee, by his acceptance of a deed-poll, becomes bound by all the restrictions, limitations, reservations, and exceptions contained in it. *Newell v. Hill*, 2 Met. 180.

Upon principle, it appears to us, that this right, plainly intended by both parties to be secured to the plaintiffs, can legally be secured in the manner adopted in this deed, treating the right reserved as an exception. And according to a well known rule of law, extensively applicable to conveyancing, if a deed cannot operate in one legal mode, to effect the intention of the parties, it shall operate in another to accomplish that purpose, if it can be done without violating any principle of law.

Prior to these deeds, the plaintiffs, as tenants in common, had a right to pass over every part of this land at their pleasure. And each tenant in common had this entire right, although he had not the entire fee. When, therefore, the grantors conveyed the front lot, they restricted themselves from any further right to pass over the whole and every part, and limited themselves to the strip thirty feet wide, specially described. This was a part of the right previously enjoyed, and this they excepted out of the grant. Had it been reserved by implication, as a way of necessity which would have been general and undefined, it would have been competent for the parties, by a deed like the present, to limit and define the right to the specific thirty feet, and such an agreement would be binding.

But were the case less clear upon principle, and upon the authorities, the court are of opinion, that the law is settled in Massachusetts, by a series of decisions, that a right of way may be as well created by a reservation or exception, in the deed of the grantor, reserving or retaining to himself and his heirs a right of way, either in gross, or as annexed to lands owned by him, so as to charge the lands granted with such easement and servitude, as by a deed from the owner of the land to be charged, granting such way, either in gross or as appurtenant to other estate of the grantee.

The rule has been rather assumed and taken for granted, than discussed and formally decided; but it has been judicially stated, adopted, and acted upon as settled law, in repeated instances, of which it will be necessary to cite a few only. *White v. Crawford*, 10 Mass. 183; *Atkins v. Bordman*, 20 Pick. 291; *Atkins v. Bordman*, 2 Met. 457; *Newell v. Hill*, 2 Met. 180; *Mendell v. Delano*, 7 Met. 176. The last case was stronger than the present; a right of way was reserved in a deed-poll, made by a tenant in common, charging the estate conveyed with a servitude, being a right of way, in favor of his separate contiguous estate; and it was held to be an easement annexed to the

latter, and binding upon parties and privies claiming under the deed by which the right of way was reserved.

The court are, therefore, of opinion, that the plaintiffs had the right of way alleged to be disturbed by the defendant; and on the facts agreed, judgment must be entered for the plaintiffs, for the amount of damages agreed upon.

WINTHROP v. FAIRBANKS.

SUPREME JUDICIAL COURT OF MAINE. 1856.

[Reported 41 Me. 307.]

On report from *Nisi Prius*, Cutting, J., presiding.

This was an action of the case for disturbing a way which the plaintiffs claimed across land of the late Elijah Fairbanks, jr., the father of the defendant.

After the evidence was out, the cause was taken from the jury by consent, and referred to the law court, with power to find such facts and draw such inferences as a jury might. If, upon the evidence, the court were of opinion that the plaintiffs had a right of way, as alleged by them, the defendant was to be defaulted for nominal damages; otherwise, the plaintiffs were to become nonsuit.

The facts in the case are fully stated in the opinion of the court.

Bradbury and Morrill, for defendant; *Lancaster*, for plaintiffs.

TENNEY, C. J. For some years prior to the year 1811, Elijah Fairbanks, sen., owned a tract of land north and south of Narrow's pond, so called, and extending therefrom to the east and to the west. It is understood that the residence of the owner was on the north side of the pond. In order to have a convenient mode of access to the land upon the south of the pond, he constructed a way from one side to the other around the eastern end of the pond, as early as the year 1807.

On June 3, 1811, he conveyed a parcel of this land, situated upon the north side of the pond and called the thirty-two acre piece, to his son, Elijah Fairbanks, jun., with the following clause after the description of the land conveyed: "Reserving forever for myself, the privilege of passing with teams and cattle across the same, in suitable places, to land I own to the south of the premises."

By an arrangement between Elijah Fairbanks, sen., and his sons Elijah, John, and Jesse L. Fairbanks, on Jan. 22, 1819, the father conveyed to each of the sons other portions of his estate; to John a lot next south of that which he had conveyed before to Elijah; to Jesse L. the parcels which are now owned by the plaintiffs; and to Elijah a lot still farther south, and in each of these deeds was the following, after a description of the premises: "Reserving to myself, and my heirs and assigns, the privilege of a bridle road or way, in any suitable

place, for the purpose of passing and repassing with creatures and teams to and from any adjoining land, owned by any of them."

The deed from Jesse L. Fairbanks to the plaintiffs, dated April 15, 1837, contains the following after the premises are described: "Also a right of way to the said the inhabitants of the town of Winthrop, their successors and assigns forever, for all purposes necessary and convenient, to and from the premises last described, across the land of said Elijah and John Fairbanks, according to reservations of right of way in their deeds of said land from my late father, and as has been used and enjoyed in carrying on and managing the land hereby conveyed, in passing to and from the several parcels thereof, through and across the land of said Elijah and John Fairbanks."

The defendant is the son of Elijah Fairbanks, jun. (who died about four years before the trial), and he forbade and prevented the plaintiffs from passing over the parcel conveyed to his father in 1811, upon the way thereon constructed, in going from one part to another of the land held under the deed of Jesse L. Fairbanks to them. And the legal question presented by the report and argument, is whether they had the right of passage attempted to be exercised.

The defendant denies the right of the plaintiffs to pass over the land conveyed to his father on June 3, 1811, on the ground that the reservation was of a right of way, *in gross* to the grantor alone, and did not pass to Jesse L. Fairbanks, and could not therefore be transmitted by the latter to the plaintiffs; or at any rate, the right could not exist after the death of Elijah Fairbanks, sen., which occurred in 1836. The plaintiffs do not admit that the reservation in the deed of Elijah Fairbanks, sen., to his son Elijah, of June 3, 1811, is one in gross to the grantor only, but that the land conveyed by that deed is charged with the easement and servitude annexed to the lands, which continued to be owned, after that deed by the grantor, as appurtenant thereto.

A reservation has sometimes the force of a saving or exception. Co. Lit. 143. Exception is always a part of the thing granted, and of a thing in being; and a reservation is of a thing not in being, but is newly created out of the lands and tenements demised, though exception and reservation have been used promiscuously. Co. Lit. 47 a. And it is well settled, that in giving construction to instruments in writing, the intention of the parties is to be effectuated, and if a deed cannot effect the design of them in one mode known to the law, their purpose may be accomplished in another, provided no rule of law is violated. Hence, the distinction between an exception and a reservation is so obscure in many cases, that it has not been observed; but that which in terms is a reservation in a deed is often construed to be a good exception, in order that the object designed to be secured may not be lost.

If the reservation in the deed of Elijah Fairbanks, sen., is to be treated as an exception and the recognition of a way over the land described, then being made by the owner of the land for himself, while he was in

the occupation and use thereof, it would confer the benefit of an exception to the grantor, his heirs and assigns, as occupants of the remaining lands belonging to him, and it would become appurtenant to these lands; and no words of inheritance would be necessary. It was a right, which, if an exception, did not pass to the grantee. This doctrine is fully recognized, in the cases cited for the plaintiffs, of *White v. Cranford*, 10 Mass. 183; *Murdell et al. v. Delano*, 7 Met. 176; *Bowen et al. v. Conner*, 6 Cush. 132. In the last case it is said, that the law in Massachusetts is settled by a series of decisions, that a right of way may be as well created by a reservation or exception in the deed of the grantor, as by a deed from the owner of the land to be charged.

The evidence reported shows, that Elijah Fairbanks, sen., regarded the passage across the parcel first conveyed to his son Elijah, to his lands south of the pond, as a convenient, if not a necessary mode of having access thereto, while he was the owner of the whole; as he had prepared a road thereon for that purpose. When he conveyed the thirty-two acre piece, he retained the right to pass over the same forever to himself. When he alienated the lands south of the pond, it was equally important to those who had an interest therein, and who owned a part or the whole of his lands on the north side, that this right of passage should continue to them, as to have previously existed in him. And if there had been no reservations in the deeds given by the grantor to his sons on Jan. 22, 1819, we are entirely satisfied, that the right of way reserved, or excepted in his deed of June 3, 1811, was intended for the benefit of his lands on the south side of the pond, and was annexed as appurtenant thereto, and would have passed by his deed to Jesse L. Fairbanks, and from him to the plaintiffs.

On other grounds, we think the right of passage over the thirty-two acre lot, clearly exists in the plaintiffs. The grantee in a deed poll, by its acceptance, becomes bound by all the restrictions, limitations, reservations, and exceptions contained in it; and the deed may charge other lands with a servitude than those which were the subject of conveyance. *Vickerie v. Buswell*, 13 Maine, 289; *Newell v. Hill*, 2 Met. 180.

On Jan. 22, 1819, Elijah Fairbanks, sen., was the owner of the whole estate excepting the thirty-two acre lot previously conveyed to his son Elijah. Over the portion so conveyed, it is admitted he had the right of way to his lands on the south of the pond. On that day he made several conveyances of parts of his farm, remaining, to his three sons, one of whom was Elijah, with the reservations therein contained. These deeds were accepted, and the grantees became bound by exceptions, which were for the benefit of the grantor, his heirs and assigns. The exceptions were not limited to the right of passage over lands, conveyed at that time, but they extended it to and from any adjoining lands, owned "by any of them." Elijah Fairbanks, jr., was then the owner of the land conveyed to him on June 3, 1811, and the land was adjoining a part of that conveyed to Jesse L. Fairbanks, the plaintiffs' grantor. This reservation or exception would therefore apply

to the lot of land over which the defendant denies to the plaintiffs the right of passage; and the interruption of this right was a wrong on the part of the defendant, for which this action can be maintained.

*Defendant defaulted.*¹

Judgment for damages in the sum of one dollar.

HATHAWAY and CUTTING, JJ., concurred.

RICE, J., concurred in the result.

MAY, J., did not sit.

EMERSON v. MOONEY.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1870.

[Reported 50 N. H. 315.]

BELLOWS, C. J.² The bill charges that the plaintiff had dug a well on the land of Joseph Mooney, and had laid an aqueduct from it through land of Iohabod Rawlings to the highway, and from thence to plaintiff's buildings, to Dudley Barker's shed, and to a dwelling-house recently occupied by Smith Emerson; that afterwards, on January 20th, 1844, the plaintiff and said Joseph Mooney made an agreement by which the said Mooney was to purchase said well and aqueduct of the plaintiff, and pay him the cost of constructing it, deducting one hundred dollars from the cost, and the plaintiff reserving the take-outs or branches to Dudley Barker's shed, and reserving water for plaintiff's house, barn, and store, and the Smith Emerson house, forever; and that on the same day the plaintiff, by deed, a copy of which is made part of the bill, conveyed to said Mooney all his right, title and interest in and unto the aqueduct well, and aqueduct leading therefrom, to the places before mentioned, "excepting the branch taken and carried to Dudley Barker's shed, agreeably to his deed from me dated November 9th, A. D. 1843, and also my right of using all necessary water at my take-outs, viz., house, store, and the house where Smith Emerson now lives, to be used in a prudent and faithful manner; and the said William will not suffer any unnecessary waste of water conducted by means aforesaid to his said places of take-outs; and the said Joseph Mooney hereby guarantees to the said William Emerson sufficient quantity of water for all necessary purposes at said places." And the bill alleges that afterwards, on April 2, 1845, and June, 1849, the said Joseph Mooney conveyed to the said Charles C. Mooney, one of these defendants, his right and interest in said aqueduct and well. That since said January 20th, 1844, branches have been laid from said aqueduct to the houses now occupied by the several defendants, and the places where

¹ See *Ring v. Walker*, 87 Me. 550 (1895).

² The opinion only is given.

the water from said branches is discharged is lower than where it is discharged or drawn at the house, barn, and store of the plaintiff, and at the Smith Emerson house.

That at certain seasons of the year there is not a full and sufficient supply of water for the several persons who claim a right to draw from said aqueduct; and the places of discharge at the premises of the several defendants being lower than those of the plaintiff at his house, barn, and store, and at the Smith Emerson house, he, and the persons occupying the Smith Emerson house, have been and are in a great measure deprived of the needful supply of water, and of the supply to which they are rightfully entitled by the agreement made with Joseph Mooney, and, as he claims, to which he is entitled by virtue of his right under the exception in his said deed to said Mooney.

The prayer is for a perpetual injunction against drawing the water to the prejudice of the plaintiff, his heirs and assigns, at his places of discharge at said house, barn, and store, and the Smith Emerson house; and that the deed aforesaid may be reformed if it does not conform to the agreement; and for general relief.

The answer alleges that the defendants do not know whether the plaintiff dug the well at his sole expense, or whether it was dug by the plaintiff and said Joseph Mooney, and denies that it was dug at plaintiff's sole expense. They admit the conveyance, and deny any other agreement than what is embodied in the deed. They admit the conveyance from Joseph Mooney to Charles C. Mooney, and that, since the conveyance of January 20, 1844, branches have been laid down from said aqueduct to the houses and premises now occupied by the several defendants; but deny that the places where the water from said branches is discharged are lower than where the plaintiff has a right to have it discharged on his premises and at the Smith Emerson house; and say that if the plaintiff, or the occupier of the Smith Emerson house, has been in any measure deprived of a needful supply of water, it has been caused by their own mismanagement, and not by the fault of any of the defendants.

A referee or master having been appointed, makes report that since the fall of 1864 the plaintiff has not received the quantity of water to which he was entitled by his deed from Joseph Mooney of January 20th, 1844, — evidently meaning his deed to Joseph Mooney; that the failure of the plaintiff to receive a supply of water is attributable to some of the defendants who are named, six of them in all; — and the referee reports the changes to be made by those defendants to secure to the plaintiff the supply of water to which he is entitled.

The defendants' counsel does not contest the right of the plaintiff to a decree restricting the defendants in the use of the water according to the referee's report, but contends that this restriction should extend no farther than during the life of the plaintiff, upon the ground that, as the exception in the deed was without words of inheritance, the plaintiff had only a life estate in the subject of the exception.

We think, however, that the estate of the plaintiff is not so limited. There are authorities, and those of a highly respectable character, which hold otherwise.

In 2 Washb. on Real Property, 641, it is laid down that the same rule which requires words of inheritance in the case of a grant, applies equally to an exception, and for this is cited Shepp. Touch. 100; and the same doctrine is held in *Curtis v. Gardner*, 18 Met. 461, and also in *Jamaica Pond Aqueduct Corporation v. Chandler et al.*, 9 Allen, 159, 170. In the latter case Bigelow, C. J., held that an exception in these terms, "to improve and cultivate and take the emoluments to his own use" of such part of the land conveyed as the grantors did not flow or cover with water, was a personal right excepted out of the grant in behalf of the grantor only, and not for his heirs or assigns; and he cites for this Shepp. Touch. 100, and *Curtis v. Gardner*, before mentioned.

It might be plausibly urged that from the terms of the exception it was the intent of the parties to limit the use of the land not flowed to the grantor personally, and that this was the view taken by the court in that case; but however this may be, we think no such doctrine has been recognized in this State as is maintained by these authorities.

It is apparent that the doctrine recognized by the authorities cited is based largely upon the authority of Shepp. Touch. 100, and as it originally stood it would seem to favor the rule for which it is cited, although it is inconsistent with another part of the same paragraph; as corrected, however, by Mr. Preston, the very learned and competent editor of that work, the doctrine of the Touchstone is, that "if the thing be excepted indefinitely, without saying for the life of the grantor, nor how long, it shall be taken to be an exception during the estate." This, in fact, is the very language of the Touchstone; and the correction by Preston is in bringing into harmony with it the language of the preceding sentence. And this correction also brings the passage into harmony with the case in Dyer, page 264, which is cited by Preston as the authority for the doctrine of the Touchstone as corrected by him. In that case the husband and wife were the termors of a messuage in Fleet Street called the Three Conies for a long term of years. The husband alone made a lease thereof for part of the term of years in these words, to wit, The messuage or tenement in Fleet Street called the Three Conies, with all the chambers, cellars, shops, &c., excepting and reserving to the husband by his name the shops, for his own proper and sole use and occupation. The husband dying during the term, and the wife surviving, entered upon the lessee in the shops, and was re-ousted, and thereupon she brought ejectment; and it was held that it appears by express provision before, and the shops were leased generally, and such reservation and exception is only special and temporary, to wit, during the occupation of the lessor himself, according to 3 B. 6, § 3, where trees were not merely excepted from the lease,

but that it should be lawful for the lessor to cut down, give away, and sell the trees; and it was noticed that the exception and reservation was made to the husband, the lessor, by his name, to wit, J. Hornby only, without saying to his executors and assigns; and it was also noticed that the exception, being of the shops, is of all the shops, which is simply contrary to the premises of the lease itself, and so a void exception.

It is obvious that the decision here went upon the ground that the exception of the shops was for the personal and special use of the husband alone, and was therefore temporary and to end with his life, and was not based upon the absence of words of limitation; and so it was in the case cited from 3 B. 6, § 3. This case, then, is no authority for the rule that an exception in a grant without words of inheritance gives only a life estate. That this cannot be the rule is manifest from a consideration of the nature of an exception. It is defined to be a clause in a deed whereby the grantor, lessor, &c., doth except somewhat out of that which he had granted before, or which was comprised within the generality of the terms of the deed — Shepp. Touchstone, 77; or, as stated in Co. Lit. 47 a, it is ever a part of the thing granted, and of a thing *in esse*. It differs from a reservation, which is always of a thing *not in esse*, but merely created or reserved out of the thing granted or demised; Co. Lit. 47 a, as a rent, a way, and the like.

In the case of an exception, the thing excepted is exempted and does not pass by the grant, neither is it parcel of the thing granted; as, if a manor be granted except one acre thereof, hereby, in judgment of law, that acre is severed from the manor. Shepp. Touchstone, 79. So it is laid down by Chancellor Kent, 4 vol. of his Commentaries, "that if the exception be valid, the thing excepted remains with the grantor with the like force and effect as if no grant had been made;" and so is 2 Washb. on Real Property, 640. The exception does not in fact create an estate in the grantor, but, in respect to the parcel excepted, leaves the title in him as it was before the grant; and there can be no substantial difference in effect between a conveyance which describes in general terms the whole of a tract of land, and then excepts a part by definite boundaries, and a conveyance which describes the tract in the first instance so as to exclude the parcel not intended to be granted. In neither case can it be said that such parcel was granted. It, in fact, has always remained with the grantor. Where the title is created by the grant, it is well settled, as a general rule, that words of inheritance are necessary to confer a fee. The rule is of feudal origin, and was based upon the idea that the personal abilities of the donee or grantee were the only inducement to the gift; and therefore his estate in the land extended only to his own person, and subsisted no longer than his own life, unless the donor, by express provision in the grant, gave it a longer continuance, and extended it to his heirs. 2 Blk. Com. 108. The rule, however, has not been fully suited to the condition of a more commercial age, and it has been softened by many ex-

ceptions, some of which are stated in Co. Lit. 9, 10, and 2 Blk. Com. 108-9. In the case of devises, an exception was established at an early period, and it was only necessary that the purpose to give a fee should be disclosed in some terms without requiring the use of the word heirs. Co. Lit. 9; 2 Blk. Com. 108-9.

In respect to an exception, we find no adjudged case in this State requiring words of inheritance to make a fee in the grantor, and we think that there has been no understanding in the profession that such a rule existed here; and unless we felt bound, by a decided preponderance of authority, we should not be inclined to adopt a rule which would be likely to unsettle many titles, and at the same time is not, as we think, based upon any sound principle. Nor do we find the weight of authority in favor of such a rule. In *Wheeler v. Brown*, 46 Penn. St. Rep. 197, there was an exception of the coal in a tract of land, granted with a right of ingress and egress to take it away, without words of inheritance. The court held that the grantor at the time of the grant held the coal in fee simple, and because it did not pass by the conveyance he continued to hold it in fee; that the word heirs was not necessary in the reservation, for an estate of inheritance existed already in the grantor, and, unimpaired by the conveyance, it descended to his heirs at his death; and so of the right of way, which was expressly annexed to the estate in the coal, and was saved by the exception.

A similar opinion is given in *Keeler v. Wood*, 30 Vt. 242; of a similar character is *Smith v. Ladd*, 41 Maine, 314, and *Winthrop v. Fairbanks*, 41 Maine, 307. This last case was a conveyance of land, "reserving forever for myself the privilege of passing with teams and cattle across the same in suitable places to land I own south of the premises," but it was not in terms to him or to his heirs and assigns. The court, however, held that it might be regarded as an exception, and confers the benefit of an exception to the grantor, his heirs and assigns; and that the way would be appurtenant to the lands for which it was reserved, and that no words of inheritance were necessary. In this case the grantor had died, and the dominant tenement was held by a grantee of his heirs. In *Bowen et al. v. Connor*, 6 Cush. 132, it was held that a reservation forever of a right of way over a street to be made by the defendant inured to the benefit of the grantor and his assigns, as owners of the back lot.

Upon these views we think the exception must inure to the benefit of the plaintiff and his heirs and assigns; and this we think accords with the intent of the parties, to be gathered from the terms of the deed. Unless, then, some other objection exists, the plaintiff is entitled to a decree against the six defendants named in the referee's report in accordance with his report; and as to the rest, they not having been shown to have interfered with the enjoyment of the plaintiff's right, the bill is to be dismissed.

The title of the plaintiff is not questioned by defendants; and it would seem that by the guaranty of the grantee, which became bind-

ing by the acceptance of the deed and the title under it, he would be estopped to deny the plaintiff's title, and so would his assigns with notice express or implied. *Newell v. Hill*, 2 Met. 180; *Goodwin et al. v. Gilbert et al.*, 9 Mass. 510.

S. M. Wheeler, for plaintiff.

Ira A. Eastman, for defendants.

153 ASHCROFT v. EASTERN R. R. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1879.

[Reported 126 Mass. 196.]

BILL in equity, filed June 13, 1878, alleging that, on October 26, 1837, John Lovejoy conveyed to the defendant a parcel of land in Lynn, over which its railroad has been located, consisting of a strip twenty-eight feet in width; that said parcel has ever since been owned and used by the defendant; that, by the terms of the deed, Lovejoy created and reserved, for the benefit of his adjoining land, an easement in the land, namely, the right to receive water from a spring by aqueduct logs, through a culvert across the land conveyed to the defendant, on to the adjoining land which was then owned by Lovejoy; that the plaintiff by mesne conveyances, had become the owner of said adjoining land and buildings of Lovejoy, for the benefit of which the easement was reserved, which easement was conveyed with the land; that Lovejoy and his grantees, including the plaintiff, have used, without interruption or objection on the part of the defendant, the culvert and aqueduct for more than twenty years prior to the acts of the defendant hereinafter complained of; that the premises belonging to the plaintiff have been used for many years for morocco and tanning business, requiring a large supply of pure water, which, prior to the acts hereinafter complained of, has always been supplied by the aqueduct running through the culvert under the railroad; that in August, 1870, the defendant caused the culvert, under which the aqueduct logs were laid, to be filled with rocks and other obstructions, the weight and force of which crushed the logs, so that the water, which should have been conducted by them into and upon the premises of the plaintiff, overflowed, wasted and flooded said premises, and caused the tenant thereof to leave; that this overflow of water was adjudged by the Board of Health of Lynn to be a public nuisance, in consequence of which the plaintiff was obliged to lay a drain to conduct away the water at great expense; that while these obstructions were being put in, and since then, the plaintiff frequently protested to the defendant against its action, and has repeatedly notified the defendant of the interference with his easement and injury to his land, and has constantly demanded of it the restoration of his rights; but it has wholly neglected and refused to

remove the obstructions and restore his rights ; that, in consequence of these acts of the defendant, the plaintiff is wholly deprived of the use and enjoyment of the aqueduct and the water therefrom, and has been prevented from carrying on his business ; that the defendant is insolvent and unable to pay its debts in full, and all of its property is mortgaged to creditors for a much larger sum than its value, although the defendant is still in the legal possession of the property, and it has no property which can be come at to be attached or taken on execution in an action at law ; that the acts of the defendant are an appropriation of a privilege, right and easement appurtenant to the plaintiff's land, of a continuous and permanent nature ; and that the plaintiff has not a plain, adequate, and complete remedy at law.

The prayer of the bill was that the defendant might be ordered to remove the obstructions, and to restore the aqueduct to its usual and former condition ; that it might be decreed to pay to the plaintiff a sum of money sufficient to compensate him for the damage done ; that it might be perpetually restrained from obstructing or in any way interfering with the plaintiff's aqueduct ; and for further relief.

The defendant filed a plea alleging that the reservation in the deed of John Lovejoy to the defendant, dated October 26, 1837, was in the words following, and not otherwise : " Reserving to myself the right of passing and repossessing, and repairing my aqueduct logs forever, through a culvert six feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said company ; which culvert shall cross the railroad at right angles with the southeasterly line of John Alley, 3d's land, seventy-four feet west of the northeasterly line of my land, measuring on the centre of the railroad ; " and also alleging that John Lovejoy died on September 12, 1876.

Hearing before *Ames, J.*, upon the bill and plea, who reserved the question of the sufficiency of the plea for the determination of the full court.

J. P. Treadwell, for the plaintiff.

R. Olney, for the defendant.

MORRIS, J. The plaintiff's right to maintain this suit depends upon the construction of the clause in the deed recited in the defendant's plea.

We are of opinion that this clause must operate as a reservation, or by way of implied grant. The operation of an exception in a deed is to retain in the grantor some portion of his former estate, which by the exception is taken out of or excluded from the grant ; and whatever is thus excluded remains in him as of his former right or title, because it is not granted. A reservation or implied grant vests in the grantor in the deed some new right or interest not before existing in him. *Shep. Touchst.* 80. *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290.

The clause we are considering does not merely reserve to Lovejoy a right of way and of maintaining aqueduct logs through the land granted.

The privilege which the parties intended should vest in him was the right of passing and repassing, and of maintaining his aqueduct logs through a culvert to be built and kept in repair by the grantee. The provision that the grantee shall build and keep in repair the culvert is an essential part of the grant, and clearly indicates that the intention of the parties was to confer upon the grantor a new right not previously vested in him, and which, therefore, could not be the subject of an exception.

It is well settled that, generally, the same rules of construction apply to a reservation or implied grant as to an express grant. In this case, the words used were, "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever through a culvert." This gave only an estate for life to Lovejoy. To create an estate of inheritance by deed to an individual, the land must be conveyed to the grantee and his heirs, and these necessary words of limitation cannot be supplied by other words of perpetuity. As stated by Wilde, J., in *Curtis v. Gardner*, 13 Met. 457, "a grant to a man to have and to hold to him forever, or to have and to hold to him and to his assigns forever, will convey only an estate for life." See also *Dennis v. Wilson*, 107 Mass. 591.

It is not necessary to decide whether the easement created by the reservation was appurtenant to the remaining land of Lovejoy. Assuming it to have been so, this could not have the effect to extend its duration. Lovejoy might assign it, if appurtenant, by a deed of the remaining land, but it would expire with his life, whether assigned or retained by him.

It follows from these considerations, that this bill cannot be maintained. Lovejoy having died before this suit was commenced, the easement had ceased to exist, and the plaintiff is not entitled to the relief prayed for in the bill. The defendant's plea, therefore, is sufficient.

*Bill dismissed.*¹

¹ See *Dennis v. Wilson*, 107 Mass. 591 (1871); *Bean v. French*, 140 Mass. 229 (1885); *Clafin v. Boston & Albany R. R. Co.*, 157 Mass. 489 (1892); *Simpson v. Boston & Maine Railroad*, 176 Mass. 359 (1900). Cf. *White v. New York & New England Railroad Co.*, 156 Mass. 181 (1892); *Hamlin v. New York & New England Railroad Co.*, 160 Mass. 459 (1894).

HAVERHILL SAVINGS BANK v. GRIFFIN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1903.

[Reported 184 Mass. 419.]

BILL IN EQUITY, filed August 17, 1901, to restrain the defendant from using and maintaining a drain from certain land on the east side of Auburn Street, in Haverhill, owned by the defendant, through land on the south side of Sixth Avenue in that city owned by the plaintiff, and praying that the plaintiff be authorized to close the portion of the drain upon its land.

In the Superior Court *Stevens*, J. made a decree granting the relief prayed for; and the defendant appealed. At the request of the defendant the judge reported the material facts found by him, in accordance with R. L. c. 159, § 23.

The report was in substance as follows: The defendant is the owner of the land described as hers in the bill, bounded on the north by the land of the plaintiff also described in the bill. Both parcels of land were owned on and before November, 1885, by one Algernon P. Nichols, who had died before the filing of the bill. The land owned by the defendant was conveyed to her by Nichols by a warranty deed in common form dated November 4, 1885. The land owned by the plaintiff was conveyed to one Warren Hoyt by Nichols, by a warranty deed in common form dated July 12, 1886. In this deed the plaintiff's land was described as bounded on the south by land of Caroline Griffin about one hundred and seven feet more or less, and contained the following clause: "And reserving to the lot next southerly owned by Griffin the right to enter a drain into a private sewer now on said land." The plaintiff acquired its title through a mortgage given by Hoyt to the plaintiff and foreclosed by the plaintiff. The mortgage did not contain any words relating to the drain. After the conveyance to the defendant, a drain was constructed by her from the lot owned by her into and through the Nichols land, afterwards conveyed to Hoyt. This drain connected with the sewer on Hoyt's land, and from the autumn of 1885 was in continuous use draining the defendant's lot.

The deed from Nichols to Hoyt containing the clause above quoted was as follows, omitting the portion after the habendum clause which contained the ordinary covenants of a warranty deed:

"Know all men by these presents that I, Algernon P. Nichols of Haverhill in the County of Essex and Commonwealth of Massachusetts, in consideration of two thousand dollars paid by Warren Hoyt of said Haverhill, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said Warren Hoyt a certain

parcel of land in said Haverhill on the southerly side of Sixth street and bounded on the North by said St. one hundred and ten feet more or less, on the east by land of the Children's Aid Society, about one hundred feet more or less, on the south by land *land* of Caroline Griffin about one hundred and seven feet more or less, and on the West by Auburn street about one hundred feet. Saving and reserving nevertheless to myself and my heirs and assigns forever for the use of said Children's Aid Society a right to pass and repass upon and over a strip of land four feet (4 ft.) wide and seventy-five feet long, extending southerly from Sixth St. and next to land of said Society, so as to make a passage way for the exclusive benefit — the adjoining estates twelve feet wide including the eight feet in width which I reserved for such use in my deed to said Society, and reserving to the lot next southerly owned by Griffin the right to enter a drain into a private sewer now on said land. To have and to hold the granted premises with all the privileges and appurtenances thereto belonging to the said Hoyt and his heirs and assigns to their own use and behoof forever."

H. N. Merrill, for the defendant.

F. H. Pearl, for the plaintiff.

BRALEY, J. At the time the defendant obtained title to her land the drain was not in existence and the deed under which she holds is silent as to any right to lay and maintain such a drain through the land of the plaintiff. Neither does it appear that this alleged right whereby the defendant would be entitled to connect her premises with the public sewer, can be said to arise by implication. See in this connection *Bumstead v. Cook*, 169 Mass. 410.

The case falls within the well recognized general rule that where an easement is not set out in the instrument under which the party claiming the privilege holds title, it must be shown to be actually in existence and connected with the estate conveyed in order to pass as appurtenant by implication. *Philbrick v. Ewing*, 97 Mass. 133; *Bass v. Edwards*, 126 Mass. 445, 449.

In order therefore to maintain her claim she is necessarily obliged to rely on the clause in the deed to the plaintiff's grantor which is in these words, "and reserving to the lot next southerly owned by Griffin the right to enter a drain into a private sewer now on said land," and the rights of the parties must be determined on the construction to be given to this clause.

At the date of this deed so far as the facts appear by the record no such right had been granted to or prescriptively acquired by the defendant, and which might be preserved for her use by the language used, on the ground that thereby an exception was created and hence the easement claimed was excepted from the grant. But they must be construed as an attempt to vest in the grantor a new interest or right that did not before exist and therefore constitute a reservation rather than an exception. *Wood v. Boyd*, 145 Mass. 176; *White v. New York & New England Railroad*, 156 Mass. 181.

As the defendant was not a party but a stranger to the deed she could gain no rights under the reservation which enured solely to the grantor, and for this reason she did not acquire an easement under it. *Murphy v. Lee*, 144 Mass. 371, 374.

It follows that the decree entered in the Superior Court was right and should be affirmed. *Decree affirmed.*¹

DEE v. KING.

SUPREME COURT OF VERMONT. 1905.

[Reported 77 Vt. 230.]

APPEAL IN CHANCERY. Heard on master's report and exceptions thereto at the March Term, 1904, Franklin County, *Start*, Chancellor. Decree dismissing bill. The orator appealed.

This case has been once before in the Supreme Court, and the decree was reversed *pro forma* for the reason stated in the opinion in this case. See 73 Vt. 375, for further statement of the facts involved.

H. P. Dee and *Farrington & Post* for the orators.

George W. Burleson, and *Alfred A. Hall* for the defendant.

WATSON, J. When this case was here before (73 Vt. 375) the decree was reversed *pro forma* and the cause remanded for additional findings of fact by the special master, as to the time when, with reference to March 16, 1882, Jared Dee asked and obtained permission of the defendant to cross his three-acre piece of land on the east side of the Central Vermont Railroad. On the hearing before the master for this purpose, the orator introduced no further evidence. The defendant testified in his own behalf, and from his testimony the fact is found that Jared Dee first asked and obtained of the defendant permission to cross that land in January, 1882. The orator seasonably objected and excepted to the defendant's testifying to any conversation had between him and Jared Dee on this point, because Jared Dee was dead.

The defendant was called and used as a witness by the orator at the first hearing, upon the question, among other things, whether Jared Dee passed through and over the three-acre piece, his habit and custom in so doing, to what extent, under what circumstances, and for what purpose. The orator made the defendant a general witness upon that question, and he thereby waived the statutory incompetency of the defendant as a witness, — *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042; *Ainsworth v. Stone*, 73 Vt. 101, 50 Atl. 805, — and he could not afterwards complain because the defendant gave testimony in his own behalf more fully upon the same subject matter.

¹ Cf. *Martin v. Cook*, 102 Mich. 267 (1894); *Beinlein v. Johns*, 102 Ky. 570 (1896); *Bartlett v. Barrows*, 22 R. I. 642 (1901).

Jared Dee having obtained permission of the defendant to cross the three-acre piece within fifteen years next after March 16, 1867, the orator can have no prescriptive way over it. A right of way over this land is neither set forth nor claimed by the orator in his bill; yet in one aspect of the case whether he has such a way is material.

The only right of way claimed by the orator over the defendant's land so far as appears by the bill, is over the one-half-acre piece on the west side of the Central Vermont Railroad, as reserved by Jared Dee in his deed dated October 7, 1862, conveying that land to William W. Pettingill. In that deed immediately following the description of the land conveyed is the clause "reserving the privilege of a pass from the highway past the house to the railroad in my usual place of crossing." The defendant contends that these words are only a reservation of a personal privilege to Jared Dee which could not pass to his heirs or assigns because no words of inheritance or assignment were used in connection therewith; while the orator contends that the clause has the force of an exception, and that the servient estate thereby created passed to the subsequent owners of the dominant estate without such words of limitation being used. Much depends upon the construction given in this regard, in the disposition of the case. Lord Coke says that "reserving" sometimes has the force of saving or excepting, "so as sometime it serveth to reserve a new thing, viz. a rent, and sometime to except part of the thing in *esse* that is granted." Co. Litt. 148, a. Sheppard says that "a reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, etc., doth reserve some new thing to himself out of that which he granted before. And this doth, most commonly, and properly, succeed the tenendum, . . . This part of the deed doth differ from an exception, which is ever of part of the thing granted, and of a thing in *esse* at the time, but this is of a thing newly created or reserved out of a thing demised that was not in *esse* before, so that this clause doth always reserve that which was not before, or abridge the tenure of that which was before." Shepp. Touch. 80. Again the same author says, that an exception clause most commonly and properly succeeds the setting down of the things granted; that the thing excepted is exempted and does not pass by the grant. p. 77. The same principles were largely laid down by this Court in *Roberts v. Robertson*, 53 Vt. 690. There the deed given by the plaintiff contained a specific description of the land conveyed, and a clause "reserving lots . . . 32, 33," etc. Under this clause the plaintiff claimed title to the two lots above named. The court, after stating the offices of an *exception* and of a *reservation* the same as above, said these terms, as used in deeds, are often treated as synonymous and that words creating an exception are to have that effect, although the word reservation is used. It was held that the clause should be construed as an exception.

In England it has been held that a right of way cannot in strictness be made the subject of either an exception or a reservation; for it is

neither parcel of the thing granted, an essential to an exception, nor is it issuing out of the thing granted, an essential to a reservation. *Doe v. Lock*, 2 Ad. & E. 705; *Durham, Etc. R. R. Co. v. Walker*, 2 Q. B. 945. But there, as in this country, *quasi-easements* are recognized in law, such as a visible and reasonably necessary drain or way used by the owner of land over one portion of it to the convenient enjoyment of another portion, and there has never been any separate ownership of the *quasi-dominant* and the *quasi-servient* tenements. As such easement, a drain is classed as continuous, because it may be used continuously without the intervention of man; and a right of way as non-continuous because to its use the act of man is essential at each time of enjoyment. In *Barnes v. Loach* (1879), 4 Q. B. D. 494, it was said regarding such easements of an apparent and continuous character, that if the owner alienates the *quasi-dominant* part to one person and the *quasi-servient* to another, the respective alienees, in the absence of express stipulation, will take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to them. And in *Brown v. Alabaster* (1888), 37 Ch. D. 490, it was said that although a right of way by an artificially formed path over one part of the owner's land for the benefit of the other portion, could not be brought within the definition of a continuous easement, it might be governed by the same rules as are apparent and continuous easements.

Cases involving *quasi-easements* have been before this Court. In *Harwood v. Benton & Jones*, 32 Vt. 724, the owner of a water privilege, dam, and mill, also owned land surrounding and bordering upon the mill pond and mill, which he subjected to the use and convenience of the mill privilege and mills. A part of these adjacent lands thus subjected was conveyed without any stipulation in the deed that any servient condition attached thereto. The condition of the estate had been continuous, was obvious, and of a character showing that it was designed to continue as it had been. The Court said this was a palpable and impressed condition, made upon the property by the voluntary act of the owner. It was held that without any stipulation in the deed upon that subject, the law was that the grantee took the land purchased by him, in that impressed condition, with a continuance of the servitude of that parcel to the convenience and beneficial use of the mill. It was there laid down as an unquestioned proposition that "upon the severance of a heritage, a grant will be implied of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have had no legal existence as easements;" and that the doctrine was equally well settled that the law will imply a reservation of like easements in favor of the part of the inheritance retained by the grantor. In *Goodall v. Godfrey*, 53 Vt. 219, a "visible, defined way in use for the obvious convenience of the whole building" was in question, consequent on a division of the property

among the representatives of the deceased owner, and the same principles of law were applied. And in *Willey, Adm'r. v. Thwing*, 68 Vt. 128, 84 Atl. 428, applying the same doctrines, a right of way was upheld under an implied reservation.

In this country it is commonly held that a way may be the subject of a reservation, and in many cases courts of high standing have held that it may properly be the subject of an exception in a grant. While it is true that an owner of land cannot have an easement in his own estate in fee, he may as before seen have a *quasi*-easement over one portion in the character of a visible, travelled way reasonably necessary to the convenient enjoyment of another portion, and when such a way exists, there would seem to be no substantial legal reason why it may not be treated as a thing in being, and as a part of the estate included in the description of the grant be made an exception in a deed of the land over which the way is, when such appears to have been the intention of the parties. That this is the principle upon which a clause reserving a way is construed as an exception appears from *Chappell v. N. Y., N. H., & H. R. R. Co.*, 62 Conn. 195, which is more particularly referred to later. There the Court said: "Then too the right to cross was, in a certain sense, a right existing in the grantors at the date of the deed. It was a part of their full dominion over the strip about to be conveyed by the deed, and not a right to be, in effect, conferred upon them by the grantees. It was something which the 'reservation' in effect 'excepted' out of the operation of the grant."

The distinction between a reservation and an exception of a way is best understood by an examination of cases involving clauses very similar to the one here under consideration, yet so unlike as to require different constructions in this regard. In *Ashcroft v. Eastern R. R. Co.* 126 Mass. 196, 30 Am. Rep. 672, the clause was "reserving to myself the right of passing and re-passing, and repairing my aqueduct logs forever, through a culvert . . . to be built and kept in repair by said company; which culvert shall cross the railroad at right angles," etc. It was held that the provision that the grantee should build and keep in repair the culvert was an essential part of the grant, and clearly indicated that the intention of the parties was to confer upon the grantor a new right not before vested in him, which, therefore, could not be the subject of an exception. In *Clafin v. Boston & Albany R. Co.* 157 Mass. 489, 20 L. R. A. 638, the clause was "reserving to ourselves the right of a passage way to be constructed and kept in repair by ourselves." There was no evidence of an existing way across the land. It was held to be a reservation and not an exception. In *Chappell v. N. Y., N. H., & H. R. R. Co.*, before cited, John W. and Benjamin F. Brown, in 1851, owned a piece of land in New London fronting on the river Thames and lying between that river and Bank street. On the river front was a wharf and docks. Between the wharf and Bank street was about one and one-half acres of land used by the Browns in carrying on a coal

and wharfage business. The wharf was valuable. In that year the Browns conveyed, for railroad purposes, a strip of this land, twenty-five feet wide, running through the land and separating the wharf from the land lying westerly of the strip conveyed, and rendering it inaccessible except by crossing the strip. This right of crossing was indispensable to the Browns and all who might thereafter own the premises then owned by them. The deed thus conveying this strip contained the clause "And we reserve to ourselves the privilege of crossing and recrossing said piece of land described, or any part thereof within said bounds." The way at the time of the date of the deed was an existing one plainly visible, necessary, and in almost constant use. The clause was construed to be an exception. In *Bridger v. Pierson*, 45 N. Y. 601, the defendant conveyed land to the plaintiff and immediately following the description the deed contained the clause "reserving always a right of way as now used on the west side of the above described premises . . . from the public highway to a piece of land now owned by" R. It was held to be an exception. In *White v. N. Y. & N. E. R. R. Co.* 156 Mass. 181, the action was tort for the obstruction of a private way claimed by the plaintiff over the location of the defendant's railroad, under a clause in a deed which read "reserving the passway at grade over said railroad where now made." This way had existed as a defined roadway or cart track, and had been used in passing to and from a highway to and from parts of the lot north of the tracks before the railroad was located, and before the deed referred to was given. The clause was held to be an exception. These are but a few of the many decisions in different jurisdictions which might be referred to upon this question, but more are unnecessary.

The language of the clause under consideration cannot be said to be unequivocal. We therefore look at the surrounding circumstances existing when the deed containing it was made, the situation of the parties, and the subject matter of the instrument; and in the light thereof the clause should be construed according to the intent of the parties. At the time of making this deed Jared Dee was the owner of land on the opposite side of the railroad, consisting of a three-acre piece of tillage land, and a hill lot adjoining it on the north, chiefly valuable for its sugar works, for its pasturage, and as a wood and timber lot. The last named lot is traversed its entire length from north to south and about a third of its width from west to east by a considerable hill, more or less ledgy and making it extremely inconvenient to cross from the grantor's own land north of the Fairbanks land, but easily reached by the now disputed right of way across the one-half-acre piece, and over the three-acre piece of tillage land. The greater portion of Jared Dee's sugar orchard, timber, and wood was on top and east of this hill. There was no way to or out of the hill lot except over the hill on Jared Dee's own land west of the Fairbanks land, or out through the three-acre piece and the one-half-acre piece onto the public highway leading westerly to Jared Dee's house. For more than ten years next

prior to the time when Jared Dee gave the deed to Pettingill, the Dees had passed over the one-half-acre piece and through the three-acre piece almost exclusively for all purposes whenever they went to or from the hill lot, whether with team, on foot, or in any other manner, except when they got wood on the west side of the lot they went from the highway across the Fairbanks farm west of the railroad, thence over the railroad at the "middle crossing" onto the hill lot. And on rare occasions they used still another route further north wholly over Dee's land. It appears from the deed itself that in crossing the one-half-acre piece they had a particular place of travelling then known to both the grantor and the grantee, for the words used in the deed in describing it are "from the highway past the house to the railroad in my usual place of crossing." Thus showing the intention of the parties to be that the grantor should retain the right to pass through this land over a visible, travelled way then in existence, and that no new way was thereby being created for his benefit.

Clearly under the law and in the light of the foregoing circumstances, the clause must be construed, not as a reservation, but as an exception. When given this construction, technical words of limitation are not applicable, for the part excepted remained in the grantor as of his former title, because not granted. *Cardigan v. Armitage*, 2 Barn. & C. 197; *Chappell v. N. Y., N. H. & H. R. R. Co.* before cited; *Winthrop v. Fairbanks*, 41 Me. 807. We think the parties intended that by this provision the grantor should permanently retain from the grant for the benefit of his land east of the railroad, the way over the one-half-acre piece, which he had been accustomed to use in crossing that land to and from the land first named. The way, thus retained became an easement over the half-acre piece of land and an appurtenant to the other land; and with the latter it would pass by descent or assignment.

Subsequent to conveying the one-half-acre lot to Pettingill, Jared Dee sold and conveyed the three-acre piece, which through mesne conveyances has become the property of the defendant. But this cannot affect the easement as an appurtenant to the hill lot; for a right of way appurtenant to land attaches to every part of it, even though it may go into the possession of several persons. *Lansing v. Wiswall*, 5 Denio, 213; *Underwood v. Carney*, 1 Cush. 285.

The master finds that if upon the facts reported the orator has a right of way or a right to cross over defendant's land to the hill lot, then the orator has suffered damage by reason of the acts of the defendant complained of in the bill, to the amount of sixty-five dollars. The orator can recover only such damages as he has suffered by acts of the defendant in obstructing the way across the one-half-acre piece, considering the fact that the orator had no right of way over or right to cross the defendant's three-acre piece. Upon this basis the damages have not been assessed. The report should therefore be recommitted for that purpose, and upon such damages being reported, a decree should be rendered that the injunction be made perpetual, and that the

defendant pay to the orator the damages found with costs in this Court. The costs in the court below should be there determined.

*The decree dismissing the bill with costs to the defendant is reversed and cause remanded with mandate.*¹

¹ See *New Haven v. Hotchkiss*, 77 Conn. 168 (1904).

HABENDUM. On the habendum see *Anon.*, Moore, 43 pl. 133 (1562); *Dowse's Case*, Cro. El. 25 (1584); *Windsore v. Hubbard*, Cro. El. 58 (1585); *Kirkman and Reingold's Case*, 3 Leon. 1 (1588); *Altkam's Case*, 8 Co. 148 a, 154 b (1610); *Turnman v. Cooper*, Cro. Jac. 476 (1618); *Goodtill d. Dodwell v. Gibbs*, 5 B. & C. 709 (1826); *Doe d. Timmis v. Steele*, 4 Q. B. 663 (1848); *Hafner v. Irwin*, 4 Dev. & B. 433 (N. C. 1839); *Tyler v. Moore*, 42 Pa. 374 (1862); Co. Lit. 21 a, 299 a; *Elphinstone*, Interp. of Deeds, c. 14, Rule 66.

CHAPTER VII.

COVENANTS FOR TITLE.¹*A. In General.*

MIDDLEMORE v. GOODALE.

KING'S BENCH. 1639.

[Reported Cro. Car. 503.]

COVENANT. Whereas the defendant by indenture enfeoffed J. S. of such lands, and covenanted for himself and his heirs with the feoffee, his heirs, and assigns, to make further assurance upon request; which lands J. S. conveyed to the plaintiff, who brings this action, because the defendant did not levy a fine upon the plaintiff's request.

The defendant pleaded release from the said J. S. with whom the first covenant was made, and it was dated after the commencement of this suit; and thereupon

The plaintiff demurred.

And all the court agreed, that the covenant goes with the land, and that the assignee at the common law, or at leastwise by the Statute, shall have the benefit thereof.

Secondly, they held, that although the breach was in the time of the assignee, yet if the release had been by the covenantee (who is a party to the deed, and from whom the plaintiff derives) before any breach, or before the suit commenced, it had been a good bar to the assignee from bringing this writ of covenant. But the breach of the covenant being in the time of the assignee, for not levying a fine, and the action brought by him, and so attached in his person, the covenantee cannot release this action wherein the assignee is interested. Whereupon rule was given, that judgment should be entered for the plaintiff, unless cause was shown to the contrary by such a day.²

¹ The only matter with reference to covenants for title here considered is their running with the land. On this, as on all other questions touching these covenants, the student should consult the admirable treatise of the late Mr. William Henry Rawle.

² See *Whits v. Whitney*, 3 Met. 81, 83 (Mass. 1841); *Chase v. Weston*, 12 N. H. 413 (1841); *Crooker v. Jewell*, 29 Me. 527 (1849); *Littlefield v. Gatchell*, 32 Me. 390 (1851); *Susquehanna Coal Co. v. Quick*, 61 Pa. 323, 339 (1869).

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BOOTH v. STARR.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1814.

[Reported 1 Conn. 244.]

THIS was a bill in chancery, brought to the Superior Court in Fairfield County; the facts stated in the bill and found by the court, were these. John Booth, in 1795, conveyed a lot of land in Hudson to Stephen Booth, the plaintiff, with the usual covenants of warranty and seisin. In 1802, the plaintiff conveyed the premises to one McKinstry; McKinstry afterwards conveyed to one Seymour; he conveyed to Thomas Williams; and he conveyed to Elisha Williams, Esq.; there being in each of the deeds the same covenants as in the deed first mentioned. At the time John Booth conveyed the premises, he was not the owner thereof in fee, but the title was in one Lucy Starr, who has since entered and evicted the last grantee; but the plaintiff has not been damnified. The respondents are the administrators of the estate and the heir at law, of John Booth, now deceased, and have his effects in their hands. Upon these facts the respondents contended, that the plaintiff was not entitled to recover. But the court decided otherwise, and decreed the payment of the sum of 2340 dollars to the plaintiff, as damages sustained by him by reason of the aforesaid breach of covenant.

The respondents moved for a new trial, on the ground that the court mistook the law in making such decree. The question of law arising on the motion was reserved for the consideration of all the judges.

N. Smith and Bristol, in support of the motion.

R. M. Sherman, contra.

SWIFT, J. The question is, whether in the case of a covenant of warranty annexed to lands, an intermediate covenantee can maintain an action against a prior covenantor, without having been sued by, or satisfied the damages to, the last covenantee, who has been evicted.

A covenant real is annexed to some estate in land; it runs with the land, and binds not only heirs and executors but assignees. Every assignee may, for a breach of such covenant, maintain an action against all or any of the prior warrantors, till he has obtained satisfaction. This results from the nature of the covenant; for each covenantor covenants with the covenantee and his assigns; and as the lands are transferable, it was reasonable that covenants annexed to them should be transferred.

As every covenantor in the various conveyances becomes liable for a breach of covenant to his covenantee and his assignees, it follows of course, that notwithstanding his conveyance of the land, he must, when subjected to pay damages for a breach of the covenant to his covenantee or his assignee, have a right of action for indemnity against his covenantor. This demonstrates that the rights and liabilities of the

various parties to a covenant real, continue notwithstanding a conveyance of the land to which it is attached; and that any of them can sustain a proper action when injured by a breach of it.

It has been contended, that a covenant real, like the land, passes by the assignment of the land from the grantor to the grantee, and is thereby extinguished, and the grantor divested of it, so that he can maintain no action for a breach subsequent to the assignment; though it is conceded, that the covenant is revived in favor of the assignor by satisfying the damages for a breach of it. But the grantor does not become totally divested of the covenant by a grant of the land. By the conveyance of the estate, the grantee becomes entitled as assignee to the benefit of the covenants annexed to the land against his grantor, and all prior grantors; but this does not take away the right which his immediate grantor had to look to his grantor, and all prior grantors for indemnity, in case of a breach of the covenant subsequent to the assignment, for which he is liable to pay damages. It cannot be said, that the covenant is extinguished by the assignment of the land, and then revived by being subjected to pay damages for a breach of it. If the covenant be once extinguished, it cannot be revived without the consent of both parties; and the circumstance that the assignor, on being compelled to pay damages for a breach of it to a subsequent assignee may maintain an action against his assignor, proves that the contract continued in force, and did not become extinguished by operation of the assignment.

To prove that the assignor cannot sue for a subsequent breach, 1 Chitty on Pleadings, 10, has been relied on; where it is said, an assignor cannot sue for a subsequent breach of a covenant running with an estate in lands, but the assignee must sue. This doctrine cannot be true to the extent contended for; as it would prove, that the assignor, after having paid the damages to his assignee, could not call on his assignor; though it is conceded in such case he could maintain an action. But to understand the meaning of Chitty, we must examine the authority to which he refers, 1 Saund. 241 c (Wms. edit.). It is there stated, "That the lessor cannot maintain an action of covenant after he has parted with the reversion for any breach of covenant accruing subsequent to the grant of the reversion; for the Statute of Hen. 8 has transferred the privity of contract, together with the estate in the land, to the assignee of the reversion." Thus, if one should lease land, and the lessee covenant to pay rent, or do particular acts on the land, and the lessor assign his interest in the reversion, then the Statute of 32 Hen. 8 transfers the privity of contract, and the assignee of the reversion only can maintain an action against the lessee for a breach of his covenant subsequent to the assignment; for he has the privity of contract and estate, and he only can be damned by the breach of covenant on the part of the lessee. But suppose a lessor makes a lease with covenant of warranty; and the lessee assigns his interest in the estate; after which his assignee is evicted and recovers damages

against him for the breach of the covenant of warranty; it will not be pretended that in this case, the lessee, who has now assumed the character of assignor, cannot maintain an action against his lessor on the covenant of warranty, though the breach happened subsequent to the assignment. The case there stated in 1 Saund. 241 c, must have related to covenants to be performed by the lessee, and must be understood to mean, that the lessor cannot bring an action of covenant *against the lessee* after he has parted with the reversion for any breach of covenant accruing subsequent to the assignment; which is a correct principle. It cannot mean that an assignor cannot sue for a subsequent breach; for this in many instances cannot be correct. The authority then relied on has no application to the point in dispute; and I apprehend the position is undeniable, that in all cases where there have been sundry conveyances of land, with covenants real annexed to them, all the covenants between each party continue operative notwithstanding such conveyance, and every one when damnified can maintain an action.

In the present case, the grantee or covenantee of the plaintiff has been evicted; but the plaintiff has never been sued, nor has he paid the damages. The question is, whether under these circumstances, he can maintain this action against the defendant, who is his immediate covenantor.

The last assignee can never maintain an action on the covenant of warranty till he has been evicted. Though the title may be defective; though he may be constantly liable to be evicted; though his warrantor may be in doubtful circumstances, — yet he can bring no action on the covenant till he is actually evicted; for till then, there has been no breach of the covenant, no damage sustained. By a parity of reason, the intermediate covenantees can have no right of action against their covenantors, till something has been done equivalent to an eviction; for till then they have sustained no damage. As the last assignee has his election to sue all or any of the covenantors, as a recovery and satisfaction by an intermediate covenantee against a prior covenantor would not bar a suit by a subsequent assignee, such intermediate assignee ought not to be allowed to sustain his action till he has satisfied the subsequent assignee; for otherwise every intermediate covenantee might sue the first covenantor; one suit would be no bar to another; they might all recover judgment, and obtain satisfaction; so that a man might be liable to sundry suits for the same thing, and be compelled to pay damages to sundry different covenantees for the same breach of covenant. In the present case, the plaintiff cannot know that his covenantee who has been evicted will ever sue him; he may bring his action directly against the defendant; a recovery in this suit, and payment of the damages, would be no bar; the defendant could then have no remedy but by petition for new trial; and if the plaintiff in the mean time should become unable to refund the money, the defendant would, by operation of law, be compelled to

pay the same demand twice, without redress. But if the principle is adopted that the intermediate covenantee can never sue till he has satisfied the damages, no such injustice can ensue.

The subject may be considered in another view. In all these cases it is the duty of the first covenantor to make good the damages for a breach of the covenant, and to indemnify all the subsequent covenantees. Each subsequent covenantor is liable to all the subsequent covenantees, and on paying the damages will have a claim for indemnity against a prior covenantor. The nature then of the engagement of the first covenantor is, to indemnify all the subsequent covenantees from all damages arising from his breach of the covenant.

It may be proper, then, to examine what is necessary to give the surety a right of action against the principal. It would seem to be a clear dictate of reason, that the mere liability to pay money for another, he continuing liable to pay the money himself, can never be a cause of action on the contract of indemnity; for it is uncertain whether the surety will ever be compelled to pay, and the principal may pay himself. Such uncertainty can be no ground of action. It is not necessary that actual payment should be made. If a suit should be brought, judgment rendered, or the person imprisoned, it will be sufficient; but mere liability, without any damage, is not. On this point no doubt could be entertained were it not for the decision in the case of *Filly v. Brace*, 1 Root, 507, where it is distinctly laid down, that mere liability, without any damage, is sufficient cause of action.

In examining this question it may be premised, that there is a difference between a contract to discharge or acquit from a debt, and one to discharge or acquit from the damages by reason of it. Where the condition of the contract is to discharge or acquit the plaintiff from a bond or other particular thing, then unless this be done, the defendant is liable from the nature of the contract, though the plaintiff has not paid. But if it be to discharge or acquit the plaintiff from any damage by reason of such land or particular thing, then it is a condition to indemnify and save harmless. 1 Saund. 117, n. (1), (Wms. edit.). In the case of *Filly v. Brace*, much reliance is placed on cases of actions sustained by sheriffs for escapes when they had not paid the debt to the creditor. The ground is assumed, that the liability of the sheriff to pay the debt gives the right of action; but this is an erroneous assumption. The wrong done by the escape itself furnishes a cause of action. The sheriff would be entitled to recover, admitting he was not liable to the creditor. Suppose an escape, and before suit brought the debtor escaping pays the debt to the creditor, this would be no bar to an action; for by the wrongful act of the escape, a right of action accrued to the sheriff, which cannot be discharged without his concurrence; and the payment of the debt to the creditor could only go in mitigation of damages.

The case of *Griffith v. Harrison*, 1 Salk. 197, is also cited. That was a covenant to be discharged and indemnified from all arrears of

rent; and the breach alleged was, that rent was in arrear. The court determined the declaration to be bad, because rent remaining in arrear and not paid, is not a damage, unless the plaintiff be sued or charged; and if paid at any time before such damage incurred by the plaintiff, it is sufficient. This is an unanswerable and conclusive authority to disprove the doctrine it is adduced to maintain. Here the liability to pay the rent is acknowledged; and the court say, it is not a damage, unless the plaintiff be sued or charged; and if paid at any time before, it is sufficient. So it may be said in the case of *Filly v. Brace*, the debt remaining unpaid is not a damage, unless the plaintiff be sued or charged; if the defendant pays it any time before the plaintiff is sued, he is not liable.

But the court do not seem to rely upon the principal point decided in that case, but on a *dictum* contained in the report. It is there said, that where the counter bond or covenant is given to save harmless from a penal bond before the condition is broken, then if the penal sum be not paid at the day, and so the condition not preserved, the party to be saved harmless does by this become liable to the penalty, and so is damnified, and the counter bond forfeited. This is the precise principle decided in the case of *Abbots v. Johnson*, 3 Bulstr. 233, cited in the case of *Filly v. Brace*, as proving the doctrine that mere liability is a ground of action. As these two cases contain but one decision which is reported at large in Bulstrode, I will examine that authority, and see whether it supports the doctrine for which it was cited. That was an action of debt on an obligation, and the case was, the plaintiff was bound in a bond with the defendant for payment of money on a day to come, and had a counter bond from the defendant for saving him harmless. The defendant paid not the money at the day. Upon this his default, the plaintiff brought his action on the counter bond. To this the defendant pleaded *non damnificatus*. The plaintiff replied, showing all this matter, and that he requested the defendant to pay this money, which he did not do; on which there was a demurrer. And the question was, whether this non-payment of the money at the day by the defendant be a present forfeiture of the counter bond, without other damage. The court decided, that the failure of payment at the day by the defendant, by which he put the plaintiff in danger of being arrested, was a damnification to him, and a present breach of the condition, and a forfeiture of the counter bond. Here it must be noted, that there was a bond conditioned to pay money at a future day; and the ground of the decision is, not the liability, but the failure of paying the money. When the plaintiff gave the penal bond with the defendant payable at a future time, no liability to be sued, or to pay the penalty, existed. When the counter bond was taken to save him harmless, it was in effect an engagement that he should never be liable to pay the money, or be subjected to the penalty. The failure to pay the money on the bond by the day rendered the plaintiff liable to pay the penalty; and this was a present breach of the condition of the

counter bond ; for by the non-payment of the money, a liability accrued which did not before exist, and this very liability arising from the failure of paying the money at the day, was the ground of sustaining the action. This is very far from proving, that where there is a contract to save harmless from an existing liability, such liability is a ground of action. Indeed, the fair inference is, that such liability is not to be deemed a ground of action from the circumstance that the court considers the failure of paying the money at the day as the forfeiture of the counter bond. I apprehend no authority can be found, that will support the doctrine laid down in *Filly v. Brace* ; and the cases cited in favor of it, directly disprove it.

But let us examine this question on principle. What is the nature of the contract to indemnify and save harmless? It is not that the plaintiff shall never be liable. The existence of the liability is the ground of the contract ; and the object of it is to make good to the plaintiff any damage he may suffer by reason of it. This liability against the consequences of which the contract is to indemnify, cannot be a breach of the contract itself. There must be actual damage arising from it to constitute a breach according to the terms of it. If liability without damage be a cause of action, then the contract is broken the moment it is made ; and the defendant may be sued. He may be subjected to pay it to his surety ; and as this will be no bar to a suit by the creditor, he may be compelled to pay it again, and then seek his remedy against the surety. The law will not countenance such absurdity and injustice. Nor is there any danger from delay to the surety ; for if he suspects that the principal is in doubtful circumstances, he may at any time satisfy the demand ; and then he has a clear right of action on the contract of indemnity.

This point is equally clear on authority. In all cases where the condition of the bond or contract is to indemnify and save harmless, the proper plea is *non damnificatus*. The defendant may say, that the plaintiff has not been damaged ; and then it is necessary for the plaintiff to reply and show the damage to entitle him to recover. This uncontestedly proves that liability is not a ground of action ; for the plea admits the existence of the liability, and denies the damage ; and the reply setting forth the damage shows it to be necessary to constitute a ground of action. Suppose to the plea of *non damnificatus*, the plaintiff should reply the liability only? Will any lawyer say, that such reply is good? If not, the consequence is, that something more than liability must be shown ; and this must always be actual damage.

In this opinion the other judges severally concurred.

New trial to be granted.

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WITHY v. MUMFORD.

SUPREME COURT OF NEW YORK. 1825.

[Reported 5 Cowen, 187.]

ON demurrer to the declaration. This was of a plea of breach of covenant, and stated that on the 21st of February, 1814, the defendant, by indenture between him and one Harnden, did grant, &c., to Harnden in fee, certain lands (describing them); and that he did covenant, &c., with Harnden, his heirs and assigns, &c., to warrant and defend the premises, &c., against all persons claiming, &c.; that on the day of the execution of this indenture, Harnden entered into possession of the premises, &c.; and afterwards, March 12th, 1817, by indenture between him and the plaintiff, conveyed the same premises to the plaintiff, in fee, who entered, &c.; but was afterwards evicted by certain persons having lawful title, before the defendant conveyed to Harnden. And so, &c.

The defendant craved oyer of the indenture between Harnden and the plaintiff, which was granted; and the indenture set forth, contained a covenant of warranty from Harnden to the plaintiff, his heirs and assigns. For this cause,

Demurrer and joinder.

J. A. Collier, in support of the demurrer.

S. Sherwood, contra.

Curia, per SAVAGE, C. J. The point on which the defendant relies, is, that the deed from Harnden to the plaintiff containing a covenant of warranty, he cannot sue as assignee.

In the days of Lord Coke, the law was understood differently. He says, "If a man enfeofeth A. to have and to hold to him, his heirs and assigns; A. enfeofeth B. and his heirs; B. dieth, the heir of B. shall vouch as assignee to A.: so as heirs of assignees, and assignees of assigns, and assignees of heirs, are within this word (assigns); which seemed to be a question in Bracton's time. And the assignee shall not only vouch, but also have a *warrantia cartæ*." Co. Lit. 384 b, and the authorities there cited.

The same doctrine is found in *Spencer's Case*, 5 Rep. 17, and in all the books. That the covenant to warrant and defend, is a covenant which runs with the land, and that the assignee is entitled to the benefit of all such covenants, is a proposition which needs not the citation of an authority for its support. The doctrine will be found, however, in 4 Cruise's Dig. 452, 3 to 7.

The case of *Middlemore v. Goodale*, Cro. Car. 503, was an action by the assignee on the covenant for further assurance. The defendant pleaded a release from J. S. with whom he made the covenant, which release was executed after the commencement of the suit. All the court agreed, that the covenant ran with the land, and that the assignee should have the benefit of it.

From these authorities it is clear that the covenant of warranty runs with the land, and is intended for the benefit of the grantee, his heirs or his assigns, according to the language of the covenant itself.

But it is contended by the defendant, that though the assignee of the grantee may generally resort to the original grantor, for a breach of the covenant happening after the assignment; yet he has not such remedy, when he has a warranty from his immediate grantor. There is surely nothing in the covenant of warranty itself, to justify such a doctrine; nor is there any reason growing out of the acts of the parties, why the assignee, by taking a warranty from his immediate grantor, should lose his claim upon the first grantor. It cannot operate by way of release. If this were the consequence, a quitclaim deed would often be a better conveyance than one with full covenants.

It is contended, however, that this doctrine is supported by authority, and the cases of *Greenby v. Wilcocks*, 2 John. 1, and *Kane v. Sanger*, 14 John. 89, are cited.

The case of *Greenby v. Wilcocks* decides, that an action upon the covenant of seisin, cannot be brought by the assignee, because the grantor, having no title when the covenant is made, it is broken immediately, before the assignment, and when broken, becomes a mere *chose in action*, and, as such, is incapable of assignment. This being the only reason given, it would seem to follow, that whoever was owner of the land, which was the *substratum* of the covenant, would be entitled to prosecute for the breach of a covenant running with that land, if broken while the land was in his hands. This case, therefore, proves nothing against the plaintiff's right of recovery in the principal case, but rather supports it. The plaintiff, an assignee, has been evicted. The covenant remained unbroken, till after the assignment to him. He has been damaged, not the original grantee, Harnden; and if the defendant's doctrine be correct, Harnden may recover damages which he never sustained, and may pocket the money; while the plaintiff, upon whom the whole loss has fallen, can recover nothing, if Harnden be unable to respond. Such a doctrine I should hold utterly untenable, were it not for what was said by the late Chief Justice Spencer, in the case of *Kane v. Sanger*.

That was an action of covenant, brought to recover damages for an eviction of the plaintiff's grantees. The counsel for the plaintiff seems not to have argued the main point; but placed his right to recover upon a variance between the defendant's notice and proof. Spencer, J., in delivering the opinion of the court, says, "It is a general rule, that where covenants run with the land, if the land is assigned or conveyed, before the covenants are broken, and afterwards they are broken, the assignee or grantee can alone bring the action of covenant to recover damages; but if the grantor or assignor is bound to indemnify the assignee or grantee, against such breach of covenant, then the assignor or grantor must bring the action." And he cites 2 Mass. Rep. 460.

In a subsequent part of the opinion, he admits, that to avoid circuity of action, a release from the plaintiff's grantees to the defendant, would have been a bar to the suit, but for the circumstance, that they had given the plaintiff mortgages; and the mortgages reinvested the title in the plaintiff; so that, in effect, there were no assignees. The plaintiff having conveyed away the property, and received it back, stood as if no conveyance had ever been executed by him. These mortgages had been assigned to Morris; and it was a fact in the case, that the suit was brought by the direction, and for the benefit of Morris; so that the recovery, after all, was virtually in favor of the assignee.

The remark, therefore, that the assignee, with warranty, could not maintain an action, as assignee, for a breach after the assignment, was not called for. It professes to be supported by no authority, but the case of *Bickford v. Paige*, 2 Mass. Rep. 460, *per* Parsons, C. J. With the greatest deference, I do not understand such doctrine to be there asserted. The case itself was an action by the covenantee, against the covenantor; and breaches were assigned upon the covenants of warranty, of seisin, and against encumbrances. The defendant pleaded, that the plaintiff, before suit brought, had conveyed to one Roberts, without any covenants making him liable for any defect of title. The plaintiff, in his replication, set out his deed to Roberts, being a release with warranty against himself, his heirs and assigns. To this replication the defendant demurred. No encumbrances were shown, nor any eviction. The court, therefore, decided, that the plaintiff ought to recover on the covenant of seisin, on the ground that this covenant having been broken before the plaintiff's release to Roberts, it was a *chose in action*, unassignable in its nature; and, therefore, did not pass to Roberts by the release. Parsons, C. J., in the course of delivering the opinion of the court, advances the doctrine relied on by the late Chief Justice of this court, in these words: "It is a general rule, that when a feoffment or demise is made of land with covenants that run with the land, if the feoffee or lessee assign the land, before the covenants are broken, and afterwards they are broken, the assignee, only, can bring an action of covenant, to recover damages, *unless the nature of the assignment be such, that the assignor is holden to indemnify the assignee against a breach of the covenants by the feoffor or lessor*. This rule is founded on the principle, that no man can maintain an action to recover damages, who can have suffered no damages."

Here, it is distinctly asserted, that the grantee, who is also the assignor, can maintain no action for damages, if he is himself not liable to his assignee. Why? because he can have suffered no damages. The assignee, who has suffered damages, and he only, can bring the action in such a case. But, if the assignor has covenanted to warrant the assignee, and has actually sustained damage, in consequence of his covenant, by a recovery against him, then he has his remedy over against his grantor. Having been damnified, he is there-

by reinvested with his original rights. Then he will have suffered the damages, which he seeks to recover on the covenant to himself; and, in such a case, the assignee is not the only person, who, under any circumstances, may prosecute the original grantor. That this is what Chief Justice Parsons meant, is evident from what he lays down as the foundation of the rule. The reason he gives is, *that no man can recover damages, who has sustained none*. Mere liability is not enough. Actual damage must have been suffered by the assignor, to authorize the action by him. To place any other construction upon the language of Chief Justice Parsons, is to render him inconsistent with himself; besides making him stem the whole current of authority.

This subject has been very fully discussed in *Booth v. Starr*, 1 Conn. Rep. N. S. 244. The facts were, that J. Booth conveyed with warranty, to S. Booth, a lot of land in Hudson. Booth conveyed to a third person, he to a fourth, and he to the fifth grantee; all with covenants of warranty and seisin. The last grantee was evicted; but the plaintiff, S. Booth, was not damnified. Swift, J., states the question to be, whether, in the case of a covenant of warranty, annexed to lands, an intermediate covenantee can maintain an action against a prior covenantor, without having been sued by, or satisfied the damages to the last covenantee, who has been evicted.

The question was discussed with great learning and ability, and at considerable length; and the court expressly decided, that the last covenantee, who has been evicted, may prosecute any, or all of the preceding covenantors, till he obtain satisfaction; but that no intermediate covenantee can sue his covenantor, till he himself has been compelled to pay damages upon his own covenant.

In this case, the plaintiff might have sued Harnden, his own immediate grantor. He did not choose to do so. Harnden may have been dead, or insolvent, or the plaintiff may have had other reasons for preferring a direct resort to the defendant. It is sufficient for his purpose, that he had a legal right to do this.

In the case of *Garlock v. Closs*, decided by this court, in May Term, 1824, a similar action was sustained by an intermediate covenantee, who had been damnified, though the property had passed through four different grantors, with warranty, down to himself. The plaintiff is entitled to judgment.

Judgment for the plaintiff.

B. Broken Covenants.

LEWES v. RIDGE.

COMMON PLEAS. 1601.

[*Reported Cro. El. 863.*]

COVENANT. The defendant, being seised of land in fee, let it for life, remainder for life, rendering rent. He afterwards acknowledged a Statute; and after that by indenture bargained and sold the reversion; and covenanted with the bargainee, his heirs, and assigns, that it should be discharged within two years of all Statutes, charges, and encumbrances, excepting the estates for life. The Statute is extended, and thereupon this reversion and rent was extended. The bargainee grants this reversion to the plaintiff, who, for not discharging of this Statute, brings covenant. And all this matter being disclosed by the count, it was thereupon demurred. The question principally moved was, whether the plaintiff, as assignee, shall have benefit of this covenant made to the bargainee by the common law, or by the 32 Hen. 8, c. 34. — But because the covenant was broken before the plaintiff's purchase, the land being then in extent, and so a thing in action, which could not be transferred over, it was adjudged for the defendant that the action was not maintainable against him.

And here the court held clearly, that the 32 Hen. 8, c. 34, doth not extend to covenants upon estates in fee or in tail, but only upon leases made for life or for years, and therefore this assignee was out of the Statute. But for the other matter principally it was adjudged *ut supra*.

LUCY v. LEVINGTON.

KING'S BENCH. 1671.

[*Reported 2 Lev. 26.*]

COVENANT, and declares, that Levington sold to Luke Lucy, the plaintiff's testator, certain lands, and covenanted with him, his heirs and assigns, that he should enjoy the same against him and Sir Peter Vanlore, their heirs and assigns, and all claiming under them; and assigns for breach, that Croke, claiming under Vanlore, ejected him. The defendant pleaded, that at the time of the covenant he was seised of an indefeasible title, and that by a subsequent Act of Parliament, reciting, that Sir Peter Vanlore had settled this estate upon the Lady Mary Powell, and that certain persons had unduly procured her to levy a fine, 't was enacted, that this fine should be void, and that all persons might enter as if no fine had been levied; and that by force of

this fine *et non aliter*, the defendant was seised, and sold and made this covenant; and that after the Act, Croke, claiming by title derived from the Lady Mary Powell, by the settlement of Vanlore, by virtue of the said Act of Parliament, entered and ousted him, upon which the plaintiff demurred. And for the defendant 't was argued, First, that the covenant was with Lucy, his heirs and assigns, touching an estate of inheritance; therefore the action ought to be brought by the heir or assignee, whose loss it is, and not by the executor. To which 't was answered and resolved by the court, *That the eviction being to the testator*, he cannot have an heir or assignee of this land; and so the damages belong to the executors, though not named in the covenant, for they represent the person of the testator. 2. 'T was argued, that the title on the covenant being good at the time of the making, and the title upon which the evidence depends, created by subsequent Act of Parliament; here is no breach, 9 Co. Rep. 106, 107, *Dame Gresham's Case*. To which 't was answered and resolved by HALE and RAINSFORD, that the Act does not make a new title, but removes the obstruction that kept off the old title; and they said, that doubtless Sir Peter Vanlore was named in the covenant, for the purpose that they might be secured in case this fine thus unduly obtained should be avoided. But TWYSDEN being of a contrary opinion, a writ of error was brought immediately. *Sed quid inde venit nescio*. *Levins* of counsel for the defendant, *Weston* for the plaintiff.

KINGDON v. NOTTLE.

KING'S BENCH. 1813.

[Reported 1 M. & R. 355.]

THIS action was brought by the plaintiff, as executrix of Richard Kingdon; and the declaration stated, that by indentures of lease and release of the 11th and 12th of May, 1780, the defendant conveyed to R. Kingdon in fee a 4th part of certain lands therein particularly described, with a proviso for redemption upon payment of £450; and that the defendant covenanted for himself, his heirs, executors, and administrators, with R. Kingdon, that he the defendant was at the time of the execution of the indenture seised of and in the premises of a good and indefeasible estate of inheritance in fee simple: and that he had good right to convey the same to R. Kingdon and his heirs: and further, that the defendant would from time to time, upon every reasonable request of R. Kingdon, his heirs or assigns, but at the defendant's costs, execute any further conveyance for the purpose of assuring and confirming the premises to R. Kingdon, *his heirs and assigns*; and then the following breaches were assigned: first, that the defendant was not seised in fee at the time of the execution of the indenture: secondly,

that the defendant had not at that time good right to convey: lastly, that the plaintiff, as executrix after the death of R. Kingdon, made a reasonable request to the defendant to execute an indenture between the defendant of the first part, the plaintiff of the second part, and Samuel Anstice of the third part, intended to be a release of the premises for suffering a common recovery for the better assuring and confirming the premises to the uses mentioned in the deed; and tendered the same to the defendant for execution, but the defendant refused to execute. The defendant demurred to the first and second breaches, assigning for causes that they are assigned too generally, and are not sufficiently precise and certain, and that it does not appear that R. Kingdon sustained or could have sustained any damage by the said breaches of covenant, or either of them, nor that he was at any time interrupted or disturbed in his enjoyment of the premises conveyed to him by the defendant; nor that the said Elizabeth has or claims any interest in the premises, or that she is heir at law, or assignee of the same, or any part thereof. He demurred also to the last breach, assigning for causes, that it does not appear that the said Elizabeth hath or claims to have any interest in the premises, as assignee or otherwise, of R. Kingdon, nor to what person, or for whose use the deed of release was intended to inure, or why or for what reason Samuel Anstice was made a party thereto, nor that the said deed of release was a reasonable conveyance or assurance in that behalf: and also for that the said last-mentioned breach of covenant cannot by law be joined in the same declaration with the other breaches of covenant in the said declaration assigned: and also for that the said declaration as to the said breach of covenant lastly assigned is in various other respects insufficient, informal, and defective. Joinder.

Gifford, in support of the demurrer.

Bayly, contra.

LORD ELLENBOROUGH, C. J. This is a case in which a person may have formed his opinion from what is to be found in a book of very excellent authority, I allude to Comyns's Digest (Com. Dig. tit. Covenant, B. 1), in which it is laid down generally that if a man covenant with B. upon a grant or conveyance of the inheritance, his executor may have covenant for damages upon a breach committed in the lifetime of his testator. But when that position comes to be compared with *Lucy v. Levington*, which is the authority there cited in support of it, it will be found not to be borne out by that case in its generality; for in that case there was an eviction in the lifetime of the testator, and therefore the damages in respect of such eviction, for which the action was then brought, were properly the subject of suit and recovery by the executor; and nothing descended to the heir. But in this case there is no other damage than such as arises from a breach of the defendant's covenant that he had a good title, and there is a difficulty in admitting that the executrix can recover at all, without also allowing her to recover to the full amount of the damages for such defect of title; and

in that case a recovery by her would bar the heir; for I apprehend the heir could not afterwards maintain another action upon the same breach. Had the breach here been assigned specially with a view to compensation for a damage sustained in the lifetime of the testator, and so as to have left a subject of suit entire to the heir, this action might have gone clear of the difficulty, because then it would not operate as a bar to the heir; but framed as it now is, it seems to me that it would operate as a bar to his action. It is certainly a new point; and if I thought that more authorities could be found than what have been cited, which, however, from the industry of the gentlemen who have argued the case, is not very probable, I should have paused. But what has been cited from Co. Lit., and the other authorities, that the executor of a person who died seised of a rent could not maintain an action to recover the arrears incurred in the lifetime of his testator, inasmuch as he could not represent his testator as to any contracts relating to the freehold and inheritance, is in a great degree an authority to show that in the present case the executrix does not stand in a situation to take advantage of this breach of covenant. Therefore on the principle of what is there laid down, and in the absence of any damage to the testator, which, if recovered, would properly form a part of his personal assets, I do not know how to say that this action is maintainable.

LE BLANC, J. This action is brought by the executrix to increase the personal estate of the testator. The difficulty arises from its being assigned as a breach of covenant in the lifetime of the testator. The breach assigned is in not having a good title. But how is that breach shown to have been a damage to the testator? It is not alleged that the estate was thereby prejudiced, during the lifetime of the testator; and if after his decease any damage accrued, that would be a matter which concerns the heir. The distinction which attends real and personal covenants with respect to the course in which they go to the representatives of the person with whom the covenants are made, is a clear one: real covenants run with the land, and either go to the assignee of the land, or descend to the heir, and must be taken advantage of by him alone; but personal covenants must be sued for by the executor. Now this is a covenant on which after one breach has been assigned and a recovery had thereon, the party cannot again recover. It is not like a covenant for not repairing, for a breach of which damages may be recovered now, and again hereafter, and so *toties quoties*; although even in that case there is always a difficulty in apportioning the damages. But here no breach from which a damage accrued to the testator is stated at all. Yet the action is brought to increase the personal estate, which belongs to the executor; when the estate itself, such as it is, has come to the heir.

BAYLEY, J. The testator might have sued in his lifetime; but having forborne to sue, the covenant real and the right of suit thereon, devolved with the estate upon the heir. If this were not so, and the executrix was permitted to take advantage of this breach of covenant,

she would be recovering damages to be afterwards distributed as personal assets, for that which is really a damage to the heir alone: and yet such recovery would be a complete bar to any action which the heir might bring. The case of *Lucy v. Levington* struck me as a strong authority for the defendant: because in that case it appears there was an actual damage accruing to the testator by the eviction, whereby he was deprived of the rents and profits during his life, and of course the personal estate was so far damnified. There, as I have before observed, if the executor could not have sued, no other person could, because the testator having been evicted, there could be no heir of the land, and that was given as a reason why the action was holden to be maintainable.

Judgment for the defendant.

KING v. JONES. 91

COMMON PLEAS. 1814.

[*Reported 5 Taunt. 418.*]

HEATH, J.¹ This is a motion in arrest of judgment. This action appears to have been brought by the plaintiff as heir of his father, against the defendant as executor of Richard Griffith, upon the covenant of the testator; and the pleadings disclose these facts: by lease and release of the 6th and 7th of October, 1794, T. Worge, and Griffith and his wife, conveyed certain premises to J. King; and Griffith covenanted with J. King that he and Mary his wife would do all reasonable acts for the further conveyance of the premises. The pleadings further disclose, that there was a request made by John King the ancestor, to Griffith, to levy a fine: that no fine was levied: that J. King the ancestor died; and the premises descended to the plaintiff as the heir of John King, and that the plaintiff has since been evicted: and the question is, whether the plaintiff can sustain this action. It was admitted that this is a covenant which runs with the land. Under this covenant the heir might call for further assurances, even to levy a fine: he certainly might have called for the removal of a judgment, or other encumbrances. It appears that John King the ancestor was a willing purchaser: he paid his purchase-money, relying on the vendor's covenant: he required him to perform it, but gave him time, and did not sue him instantaneously for his neglect, but waited for the event. It was wise so to do, until the ultimate damage was sustained; for otherwise he could not have recovered the whole value: the ultimate damage, then, not having been sustained in the time of the ancestor, the action remained to the heir (who represents the ancestor in respect of land, as the executor does in respect of personalty), in preference to the executor. These are the principles of the case; how are the authori-

¹ Only the opinion is given.

ties? There are few old authorities directly in point, but there is one recent case that is directly applicable. The old authorities are, Fitzherbert, N. B. Writ of Covenant, p. 341 C. "If a man make a covenant by deed to another, and his heirs, to enfeoff him and his heirs of the manor of D., &c., now, if he will not do it, and he to whom the covenant is made dieth, his heir shall have a writ of covenant upon that deed:" he cites the *Case of Sir Anthony Cook*, Dy. 337; also reported in Anders. 53. [Here his Lordship read the case.] The recent decision is that of *Kingdon v. Nottle*. last Easter Term, 1 Maule & Selwyn, 355, wherein the Court of King's Bench held that the executor could not recover upon a breach of the defendant's covenant with the testator, that he, the defendant, had a good title to convey, the testator having sustained no damage in his lifetime; therefore it follows that the heir might so recover. The court there follow the doctrine of *Lucy v. Levington*, and they advert to the circumstance which differs that case from this, that there the ultimate damage was sustained in the time of the ancestor, and therefore the land did not descend to the heir; consequently the covenant, which runs with the land, did not descend to the heir. The consequence is, that this judgment ought not to be arrested, and that the rule must be discharged.

Rule discharged.

Sellon, Serjt., for the plaintiff.

Shepherd and *Blosset*, Serjts., for defendant.

KINGDON v. NOTTLE.

KING'S BENCH. 1815.

[*Reported 4 M. & S. 53.*]

COVENANT by the plaintiff as devisee of Richard Kingdon; and the plaintiff declares that by indentures of lease and release of the 11th and 12th of May, 1780, the defendant conveyed to R. Kingdon in fee a fourth part of certain lands therein particularly described, with a proviso for redemption upon payment of £450; and that the defendant covenanted for himself, his heirs, executors, and administrators, with R. Kingdon, that he the defendant was at the time of the execution of the indenture seised of and in the premises of a good and indefeasible estate of inheritance in fee-simple; and that he had good right to convey the same to R. Kingdon and his heirs; and then the plaintiff avers that R. Kingdon, on the 3d of May, 1791, duly made his will, &c., and thereby devised the same premises to her in fee, and died seised, and that she (the plaintiff) entered into the premises, and became and was and continually hath been possessed thereof, and seised of and entitled to all such estate and interest of and in the same as R. Kingdon had in his lifetime, and at the time of his death, and assigns for breach, 1st, that the defendant, at the time of the execution of the indenture, was

not seised, &c. ; 2dly, that he had not good right to convey to R. Kingdon and his heirs, &c. And so the plaintiff says, that by reason thereof the premises are of much less value, to wit, less by £2,000 to the plaintiff than they otherwise would be, and that she hath not been able to sell, and hath been prevented and hindered from selling the same, for so large a price or so beneficially and advantageously as she otherwise might have done. And so she saith that the defendant hath not kept his covenant so made with R. Kingdon, but to keep the same with R. Kingdon in his lifetime, and the plaintiff, since his death, hath wholly refused.

Demurrer assigning for cause, 1st, that it appears by the declaration that the supposed breaches of covenant therein assigned were committed in the lifetime of R. K., before the plaintiff had any estate or interest in the premises ; and also, that it does not appear by the declaration that R. K. was at any time disturbed or interrupted in the enjoyment of the premises by the defendant or any other person, or sustained or could have sustained any damage by the same supposed breaches of covenant or either of them, and also for that it is not alleged that the plaintiff hath at any time since the death of R. K. been interrupted or disturbed in the enjoyment of the premises, or any part thereof, or hath sustained any damage from the supposed breaches of covenant or either of them ; and also that it does not appear that any person hath refused to purchase the premises on account of the supposed breaches of covenant, and also that the allegations that the premises are of much less value than they otherwise would be, and that the plaintiff hath not been able to sell, and hath been prevented and hindered from selling the same for so large a price or so beneficially and advantageously as she otherwise might have done, are too general, and do not give the defendant sufficient notice of the supposed damage.

Joinder.

Gifford, in support of the demurrer.

LORD ELLENBOROUGH, C. J. The rule with respect to the executor's right to sue upon breaches of contract made with the testator was considered in the former case of *Kingdon v. Nottle* as subject to some qualification ; and in a still more recent case, *Chamberlain v. Williamson*, 2 M. & S. 408, it was considered that he could only recover in respect of such breach as was a damage to the personal estate. But here the covenant passes with the land to the devisee, and has been broken in the time of the devisee ; for so long as the defendant has not a good title, there is a continuing breach ; and it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require. Here, according to the letter, there was a breach in the testator's lifetime ; but according to the spirit, the substantial breach is in the time of the devisee, for she has thereby lost the fruit of the covenant in not being able to dispose of the estate.

LE BLANC, J. If the covenant is to cease with the breach of it, then

if it be broken, and the covenantee die immediately after, the covenant will be gone; and yet the injury arising from the breach would accrue altogether to the devisee.

DAMPIER, J. This is a covenant which runs with the land; but if it may be broken but once, and ceases *eo instanti* that it is broken, how can it be a covenant which runs with the land?

*Judgment for the plaintiff.*¹

Bayly was to have argued for the plaintiff.

GREENBY v. WILCOCKS.

SUPREME COURT OF NEW YORK. 1806.

[Reported 2 Johns. 1.]

THIS was an action of *covenant*. The declaration set forth a deed, made the 30th August, 1792, between the defendant, of the one part, and Carlile Pollock, of the other part, by which the defendant conveyed to Pollock, certain lots of land, in the County of Cayuga. The deed contained the usual *covenants*, on the part of the grantor with the grantee, his *heirs* and *assigns*; namely, that the grantor was well seised in fee, &c., had power and right to grant and convey; that the grantee should quietly enjoy, free from encumbrances, &c., and a *warranty* against the grantor and his heirs, and all persons whomsoever. The declaration further stated, that Pollock entered, and was possessed of the premises; and afterwards, on the 17th July, 1793, he and his wife granted and conveyed one of the lots of land, to Abraham Hardenbergh, who entered, and was possessed thereof; and being so seised and possessed thereof, afterwards, on the 5th July, 1794, granted and conveyed the same lot to Kellogg, the intestate. The plaintiff then averred, that at the time of executing the deed to Pollock, the defendant "was not seised and possessed of any right, title, or interest whatsoever, of, and in the said last described lot of land, but the title to the same lot of land, was vested in one John H. Holland; nor had the defendant any lawful power or authority, to sell and convey the same as aforesaid; nor hath the defendant secured and defended the said Pollock, Hardenbergh, or Kellogg, or either of them or their assigns, or the plaintiffs, in the quiet possession of the said lot of land; but, on the contrary, the said Kellogg, afterwards, in his lifetime, to wit, on the 5th July, 1794, was expelled from, and dispossessed of, the said lot of land; of all which, the said defendant had notice, &c., and so the plaintiffs say, that though often requested, &c., the defendant hath not kept his said covenant, so made and entered into, with the said Pollock," &c.

¹ But see *Spoor v. Green*, L. R. 9 Exch. 99 (1874); *Turner v. Moon*, L. R. [1901] 2 Ch. 825.

To this declaration, the defendant *demurred*, and the plaintiffs joined in demurrer.

Hopkins, for the defendant.

Gold, for the plaintiffs.

SPENCER, J. The plaintiffs' right to judgment, must rest on the covenants of seisin, and power to sell and convey in fee-simple. The eviction stated in the declaration, does not appear, nor is it averred, to have taken place by process of law; covenants for quiet enjoyment and a general warranty, extend only to lawful evictions. Some of the cases admit, that the action lies for breach of covenant for quiet enjoyment, if the person to whom the right belongs *oust* the possessor. In the present case, it is not alleged, that the *ouster* was committed by any person having right, or superior title.

It is objected, that the plaintiffs cannot recover on the covenants of *seisin*, and that the grantor had power to convey, because, it is alleged in the declaration, that there was a total defect of title in the defendant, at the time he executed the deed, and that the covenants then broken, could not be assigned over by the first grantee.

There is great force in this objection, and it appears to me conclusive. *Choses in action* are incapable of assignment, at the common law; and what can distinguish these covenants, broken the instant they were made, from an ordinary *chose in action*? The covenants, it is true, are such as run with the land, but here the substratum fails, for there was no land, whereof the defendant was seised, and of consequence, none that he could *aliene*; the covenants are, therefore, naked ones, uncoupled with a right to the soil. This point was determined in the case of *Lewis v. Ridge*, Cro. Eliz. 868. The court held, in that case, that the covenant being broken, before the plaintiff's purchase, and so, though the covenants were against the precise encumbrance, that it was a thing in action, which could not be transferred over, and judgment was given for the defendant on demurrer. I cannot find that this case has been overruled. *Spencer's Case*, 15 Co. 17, presents a very distinct question, from the one now under consideration; it involved only the case of an assignee of a *term*, sued by the lessor, with respect to the covenants, which, running with the land, are imposed upon the assignee.

I am, therefore, of opinion, that the defendant must have judgment.

KENT, C. J., THOMPSON, J., and TOMPKINS, J., declared themselves to be of the same opinion.

LIVINGSTON, J. I cannot assent to this opinion. One of the covenants declared on, is that of a seisin in fee of the grantor. It since appearing, that he was not thus seised, and, of course, that this covenant was broken immediately on executing the conveyance, it is now said that it could not be transferred, so as to entitle the assignee to an action for the breach of it.

One would naturally suppose, that every covenant in a deed conveying an estate of inheritance, would pass with the land, and confer on the owner, however remote from a former grantor, a remedy for an

unsatisfied violation of any of them, without inquiring when the right of action first accrued. They all extend, by express terms, as well to assigns *ad infinitum*, as to the first grantee. It comports, then, with the contract, and is in itself reasonable, that they should *all* form a part of every grantee's security; nor can it be right, that those who come in under this covenant, which may be the only one in a conveyance, shall not be able to recover any part of a large consideration, merely because an alienation intervened, prior to a discovery of any defect of title. By this means a most useful covenant, and in daily use, will become a dead letter, before it can be enforced, as, very often, repeated sales take place, before a title is discovered to be bad. We are, however, told, that such is the law, and are referred to some authorities. Between the case of *Lewis v. Ridge* and this one, there is a distinction which will be an excuse for not applying it in a way, that the court could not have intended, and which can answer no other purpose, but that of depriving an innocent purchaser of his remedy, and of annulling (which courts sometimes take the liberty of doing) a contract, to which the parties have solemnly bound themselves. The distinction is this. In the case from Croke, the covenant (which was to discharge all *Statutes, &c.*, in two years) was not only broken, but this was *known* to the purchaser; for a Statute, which was the encumbrance complained of, was matter of record, and the land, at the time of sale, was *actually* extended for its satisfaction. It was, *therefore*, thought, that the plaintiff had bought a *chose in action*, and the court (which was less indulgent formerly than at present, to these bargains) set its face against him. But in cases of the kind before us, such knowledge can rarely exist, for as soon as a title is discovered to be questionable, there will generally be a stop to farther alienation. The reasoning, therefore, in this case, does not apply; for why punish a person for buying a *chose in action*, by a forfeiture of his remedy, when he neither knew, nor suspected, at the time, that such a right existed? It might be asked, What makes a covenant more a *chose in action* after, than before its breach? In all purchases in fee, has not the land always been considered, as it really is, the thing bargained for, and that the covenants without distinction, necessarily pass with it? Thus we shall get rid altogether of the idea of purchasing a thing in action, which can only be entertained by a fanciful distinction between covenants broken, and those which may be broken in future. Is there in reality, anything more obnoxious or criminal in assigning the one, than the other? If there be any turpitude in the thing, why do courts, nowadays, go so far in supporting transfers of *choses in action*, as to protect the rights of an assignee, though not a party to the record? Another case, more recent, that of *Andrew v. Pearce*, 1 Bos. and Pull. New Rep. 158, which was also relied on, proceeded on the ground of the lease being *absolutely void*, prior to its assignment, and that, therefore, *no interest in the land, could pass under it*; of course, there remained *only* a right of action to sell. Now, though the party in that case

ought, perhaps, to have been *estopped*, from saying that *nothing* passed by his deed, yet taking this decision as we find it, and even receiving it, late as it is, as authority, it makes in favor of the plaintiff. From the judgment delivered by Sir James Mansfield, and the reasonings of all the counsel, it is evident, that if *any* interest in the land had passed with the assignment, the covenant whenever broken, would have passed with it, and the action been supported. If so, how does it appear, that nothing passed by the deed of Wilcocks, or by the one to the plaintiffs' intestate? Though it was not a fee simple (which must be the only meaning of the averment in the declaration), some smaller estate or interest may have passed, which would have carried the covenant of seisin along with it, and been sufficient to take this case out of the principle of *Andrew v. Pearce*.

But this is not the ground on which I rest; it is that of the *contract* itself, by the words of which all the covenants passed to every grantee *ad infinitum*, and gave him, of course, an action in his own name, against any preceding grantor, whether a breach happen before or after the assignment, provided no satisfaction has been obtained for it in another name. Nor is it without authority that this ground is taken, for in the *Case of Spencer*, in Sir Edward Coke's reports, it was resolved, "that if the assignee of a *lessee* be evicted, he shall have a writ of covenant, for it is reasonable if he be evicted, that he shall take such benefit of the demise, as the first lessee might, and the lessor hath no other prejudice, than what his *especial contract* with the *first lessee*, hath bound him to." In this lease it is worthy of remark too, that there was no express covenant, but only words which implied one. It is not stated, it is true, when the breach took place, but the lessor without any such distinction, is placed, in relation to the sub-tenant, on precisely the same footing, as it respected a remedy on the lease, as he stood in with regard to his immediate lessee. The court must have considered the contract of assignment as entire, and that with it, not only the land, but all the agreements of the lessor, passed; for it is not easy to be understood, how the covenant of warranty should pass to the grantee, as it is admitted it did, so as to give him a right to sue in his own name, and yet that a different rule is to be applied as to the covenant of seisin.

I concur in the opinion delivered, as to the mode of stating an eviction, in which respect the declaration is imperfect; but the breach of the covenant of seisin being well assigned, the plaintiff, in my opinion, is entitled to judgment.

*Judgment for the defendant.*¹

¹ The principal case has had a large following in the United States. But see *Backus v. McCoy*, 3 Ohio, 211 (1827); *Martin v. Baker*, 5 Blackf. 232 (Ind. 1839); *Mecklem v. Blake*, 22 Wis. 495 (1868); *Allen v. Kennedy*, 91 Mo. 324 (1886). For statutory changes, see Rawle, *Cov. Tit.* (5th ed.) § 211, and *Geisler v. De Graaf*, 166 N. Y. 889 (1901), *post*.

CLARK v. SWIFT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[Reported 3 Met. 390.]

COVENANT broken. The declaration alleged that the defendant, on the 2d of June, 1815, by his deed conveyed certain land in Andover to Thomas Holt, and in said deed covenanted with Holt, his heirs and assigns, that the conveyed premises were free from all encumbrances: That the plaintiffs, by virtue of a conveyance of said land by Holt, and by sundry subsequent conveyances thereof, have acquired title thereto, and, on the 5th of November, 1830, became the assigns of the defendant, and ought to have and enjoy the land free of all encumbrances, according to the defendant's covenant aforesaid: That the land, when the defendant so conveyed it to Holt, was not free from all encumbrances, and never since has been; but that the defendant, on the 9th of April, 1814, conveyed to Ralph H. Chandler, his heirs and assigns, a right of way over said land, and "the privilege of going to and using the well and pump" upon said land; which rights "still exist, and did exist at the time of making said deed to said Holt, and have existed ever since," as an encumbrance on the land.

At the trial before *Putnam, J.*, the facts stated in the plaintiffs' declaration were proved or admitted, and a verdict was returned for the plaintiffs, subject to the opinion of the whole court, whether they could maintain the action.

Several points of defence, which were raised on the evidence, and ruled against the defendant at the trial, are here omitted, as it became unnecessary for the court to decide upon them.

This case was argued at Boston, January 21, 1841.

Hazen, for the defendant.

F. Cummins, for the plaintiffs.

WILDE, J. At the trial of this cause several questions of law were raised and reserved for the consideration of the court, most of which, according to the view we have taken of the case, become immaterial, as we consider one objection to the form of the action conclusive in favor of the defendant.

The action is founded on the alleged breach of the defendant's covenant against encumbrances in his deed to Thomas Holt of the premises described in the writ, and from whom the plaintiffs derive their title. The breach alleged is, that at the time of executing said deed to the said Holt, the land conveyed to him was not free from all encumbrances, but that the defendant had before that time granted a passage and right of way, over and along said land conveyed, to one Ralph H. Chandler; which encumbrance, it is averred, still exists, and did exist at the time of making said deed to said Holt, and has existed ever since. Thus it appears, by the plaintiffs' own showing, that the cove-

nant on which they rely was broken as soon as made; and that a covenant thus broken does not run with the land, is a well-established doctrine of the common law. A right of action for the breach of this covenant immediately accrued in favor of Holt, and thus chose in action, like all other choses in action, is not assignable, so as to authorize the assignee to maintain an action in his own name. An assignee cannot sue upon a breach of covenant that happened before his time. Com. Dig. Covenant, B. 3. Bac. Ab. Covenant, E. 5. The case of *Lucy v. Levington*, 2 Lev. 26, is a leading authority on this point, in which it was decided that an action by the executor of the covenantee upon a covenant for quiet enjoyment of land conveyed was well brought; the breach assigned being that the plaintiff's testator was evicted in his lifetime, and so the covenant being broken, did not go with the land to the heir. So in *Lewes v. Ridge*, Cro. Eliz. 863, which was an action by an assignee, on a covenant which had been broken before the assignment, it was held that for such a breach, being a thing in action not transferable by law, an action was not maintainable in the name of the assignee.

A different doctrine, however, was laid down in the case of *Kingdon v. Nottle*, 4 M. & S. 53, in which it was held that an action might be maintained by a devisee of the grantee of land, on the covenant or seisin, although broken in the lifetime of the testator; the breach being considered as continuing in the time of the devisee. It was also decided in *Kingdon v. Nottle*, 1 M. & S. 355, that for such a breach of covenant no action could be maintained by the executor of the grantee. But it seems difficult to reconcile these decisions with the former authorities, and with the well known rule of the common law, that choses in action are not assignable; and they are certainly against the current of subsequent authorities.

In the case of *Bickford v. Page*, 2 Mass. 455, it was decided that the covenant of seisin, having been broken immediately on the execution of the deed, was then a chose in action, and not assignable. So in *Prescott v. Trueman*, 4 Mass. 627, it was held that the covenant against encumbrances is broken immediately by any subsisting encumbrance. And recently, in *Thayer v. Clemence*, 22 Pick. 493, 494, the same doctrine is laid down by the Chief Justice, in delivering the opinion of the court: "the usual covenants in a deed of warranty, are, that I am seised, &c., that I have good right, &c., that the premises are free of all encumbrances. These," he says, "are all *in præsenti*, and if the facts covenanted to be true are not so, the covenants are broken when made, the right to enforce them is a chose in action, and cannot be assigned so as to enable an assignee to bring an action in his own name."

The same doctrine is held in New York: *Greenby v. Wilcocks*, 2 Johns. 1; *Hamilton v. Wilson*, 4 Johns. 72; *Kane v. Sanger*, 14 Johns. 89; and in New Jersey: *Chapman v. Holmes*, 5 Halst. 20; *Garrison v. Sandford*, 7 Halst. 261; and in Vermont: *Garfield v.*

Williams, 2 Verm. 827; and in Connecticut: *Mitchell v. Warner*, 5 Conn. 497. In the latter case Chief-Justice Hosmer examined the doctrine and the authorities very fully, and with great ability; and particularly the case of *Kingdon v. Nottle*. "From the opinion in that case," he declares, "I am compelled to dissent *in omnibus*. First, I affirm that the novel idea attending the breach in the testator's lifetime, by calling it a continuing breach, and therefore a breach to the heir or devisee at a subsequent time, is an ingenious suggestion, but of no substantial import. Every breach of a contract is a continuing breach, until it is in some manner healed; but the great question is, *To whom* does it continue as a breach? The only answer is, To the person who had title to the contract, when it was broken. A second supposed breach is as futile as the imaginary unbroken existence of a thing dashed in pieces. It has no analogy to a covenant to do a future act at different times, which may undergo repeated breaches." He concludes, therefore, that the determination in the case of *Kingdon v. Nottle* "is against the ancient, uniform, and established law of Westminster Hall, and against well-settled principles and decided cases in the surrounding States."

These objections to the decision in the case reviewed are certainly very forcibly expressed. That decision, as Chancellor Kent remarks, was severely criticised. But we concur in the opinion that the decision cannot be reconciled with a well-established principle of the common law. The distinction on which the principle, that choses in action are not assignable, is evaded, is not well founded. Chancellor Kent says, "The reason assigned for the decision is too refined to be sound." 4 Kent Com. (8d ed.) 472. There was not in that case, and there could not have been, but one breach of the covenant of seisin. "It was single, entire, and perfect, in the first instance;" and thereupon a right of action vested in the testator; and, unless this right could by law be transferred to the devisee, no action in his name could be maintained in a court of law. This rule as to choses in action is a technical rule, it is true, and does not affect the merits of the case. But technical rules, and rules as to the forms of proceedings, must be observed, without regard to the consequences which may follow in particular cases; otherwise, the stability of judicial decisions, and the certainty of the law, cannot be preserved.

As to the rule in question, it interposes a formal difficulty only; and it is no actual obstruction to the due administration of justice. The assignment of a chose in action is valid in equity, and courts of law will take notice of equitable assignments, made *bona fide* and for a valuable consideration, and will allow the assignee to maintain an action in the name of the assignor.

In the present case, however, the action could not be maintained, although it had been brought in the name of Holt, the original grantee; because it is clear that the action accrued to him more than twenty years before the present action was brought, if in fact there was an

existing encumbrance on the granted premises, at the time of the grant. The action, therefore, would be barred by the Statute of Limitations. It is true, that if such an action had been brought before any disturbance of the possession, and before the encumbrance had been removed, the plaintiffs would have been entitled to only nominal damages; but then twenty years are allowed, in such a case, after the breach of the covenant, for the party to clear away the encumbrance, and to entitle himself to a full indemnity. And if he lies by until the limited time expires, without removing the encumbrance and commencing his action, the Statute of Limitations will certainly be a good bar.

The plaintiffs' only remedy, if they have any, is on the covenant of warranty. That covenant runs with the land; and if the plaintiffs had been evicted by a paramount title, they could undoubtedly maintain an action for the breach of that covenant, in their own names. Whether the facts reported show such a disturbance of the possession as would be considered equivalent to an eviction by a title paramount, is a question upon which at present we give no opinion. The question cannot be raised in this case, unless the plaintiffs should move for leave to amend their declaration, which may be allowed on such terms as the court may hereafter direct.

(On motion the plaintiffs had leave to amend their declaration.)¹

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COLE v. KIMBALL.

SUPREME COURT OF VERMONT. 1880.

[Reported 52 Vt. 639.]

COVENANT. The declaration counted on a covenant against encumbrances in a deed from the defendant to the plaintiff Florette. The case was referred, and the referee reported in substance as follows:

On August 26, 1871, the defendant by warranty deed containing the usual covenants, including a covenant against encumbrances, conveyed to the plaintiff Florette certain premises in Braintree that had been conveyed to him by Mansel Heselton and wife; and said Florette, in payment therefor, conveyed to the defendant a farm which had before been conveyed to her by her father, Leonard Fish, and with her husband executed to him a promissory note for \$462, which said Leonard afterwards paid. On June 11, 1872, the plaintiffs by like deed conveyed the premises to Lucia M. Fish, the mother of said Florette, and wife of said Leonard. The premises when conveyed by the defendant as aforesaid, were subject to a mortgage executed by Heselton and wife to Elihu Hyde in 1869, conditioned for the payment of two promissory notes for \$250 each, payable in one and two years respectively, with interest, one

¹ See, *accord*, *Mitchell v. Warner*, 5 Conn. 497 (1825). *Contra*, *M'Crady v. Brisbane*, 1 Nott & McC. 104 (So. Car. 1818).

of which only had been paid. In December, 1875, Hyde brought a petition for foreclosure against the Fish's and others, but not against the Heseltons nor the Coles, and in the following January obtained a decree for \$313.29, the sum due in equity, and \$28.55 costs, to be paid before January 1, 1877, with interest. On November 1, 1876, Hyde sold and assigned that decree to Ephraim Thayer for \$350, Thayer acting therein for said Leonard and at his request; and afterwards, and before this action was brought, said Leonard, acting therein for his wife, paid Thayer the amount of the decree in full, with interest. The conveyance from said Leonard to said Florette, and from her to said Lucia were without consideration, and they and the holding of title by said Florette were for the convenience, and at the request, of the Fish's, said Leonard doing all the business in connection therewith, and the plaintiffs having nothing to do with it, except to execute deeds, &c., as desired. This action was brought and prosecuted by said Lucia, in her own behalf and for her own benefit, and with the privity and consent of said Leonard. The referee found that if the plaintiffs were entitled to recover, they should recover \$341.84, with interest from January 1, 1876.

While the action was pending the Fish's, in consideration that final judgment should ultimately be rendered therein for the plaintiffs for the full amount of damages found by the referee, filed in court a release of the defendant from all causes of action that they or either of them had, or could have, in their own names to recover damages consequent on a breach of any of the covenants in his deed to said Florette.

The court at the December Term, 1879, *Powers, J.*, presiding, rendered judgment on the report for the plaintiffs for nominal damages and costs; to which the plaintiffs excepted.

P. Perrin and J. W. Rowell, for the plaintiffs.

N. L. Boyden, for the defendant.

The opinion of the court was delivered by

ROYCE, J. It is conceded that the plaintiffs are entitled to nominal damages; and the only question made is, whether upon the facts found by the referee they are limited to the recovery of such damages, or are entitled to recover the amount paid to redeem the premises from the Hyde decree. This suit was brought and prosecuted by Lucia M. Fish, for her benefit, with the privity and consent of her husband, Leonard Fish, who acted for her in paying the money to redeem the premises from the Hyde decree. Florette D. Cole held the title to the premises conveyed to her by the defendant as the trustee of Leonard and Lucia M. Fish, and the covenants contained in the deed from the defendant to Florette D. are in equity to be treated as covenants for the benefit of the *cestuis que trust*. All the interest that Florette D. had in said covenants passed to Lucia M. Fish by the deed from the plaintiffs to her. The defendant is liable on the covenants in his deed to protect the title against the encumbrances that were upon the premises described in the deed at the time of its execution. The covenant against

encumbrances runs with the land, and can be enforced for the benefit of the party holding the legal title. The payment of the amount due on the Hyde decree was not a voluntary payment, but a compulsory one. Fish was obliged to make it to save his title to the premises. The claim to indemnity on account of the breach of the covenants of title and against encumbrances was a chose in action, and was transferred to Lucia M. Fish by the deed from the plaintiffs to her; and the assignee of a chose in action has the right (subject to the right of the assignor to require indemnity against costs) to sue in the name of the assignor. It is a matter of indifference to the defendant to whom he pays, if he is fully protected against any further liability. It is not claimed that there is any other party but Leonard Fish and wife that could make any claim against the defendant on account of his covenants; and the discharge filed in the case is a full protection against any claim that they might otherwise make. The rule of law that limits the recovery in actions of covenant against encumbrances to the amount paid to remove the encumbrance was adopted for the protection of the covenantor, for until full payment the liability of the covenantor would continue. The cases relied upon by the defendant differ from this in the important fact that in none of those cases did it appear that the suit was being prosecuted for the benefit of an assignee who had been compelled to make payment to save his estate, and full indemnity had been tendered to the covenantor. The attempted defence is purely technical; and it does not appear that any defence which the defendant might have made if the suit had been in the name of Leonard Fish and wife was not equally available to him in the present suit. In *Smith v. Perry, Admr.*, 26 Vt. 279, the plaintiff had not paid the judgment recovered by his grantee on account of the breach of his covenant of title, but the court allowed a full recovery to be had, protecting the defendant's estate against further liability by the form of the judgment rendered. Here, as we have seen, the defendant is protected by the discharge filed.

Judgment reversed, and judgment for the largest sum.

GEISZLER v. DE GRAAF.

COURT OF APPEALS OF NEW YORK. 1901.

[Reported 166 N. Y. 339.]

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered November 17, 1899, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court, and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frank L. Holt and Isaac N. Miller, for appellant.

George C. Lay, for respondents.

O'BRIEN, J. The plaintiff is the remote grantee of lands which the defendants' testator owned on the 29th day of January, 1892, and on that day conveyed to one Knabe by deed with full covenants. At the time of this conveyance the lands were incumbered by a local assessment amounting to \$224.41, with interest. On the 12th day of March, 1892, Knabe conveyed the lands to one Breirly, expressly subject to the assessment, and on the 2d day of October, 1893, the latter conveyed to the plaintiff with a covenant against incumbrances. On the 23d day of October, 1896, the plaintiff was obliged to and did pay the assessment, amounting at that date to \$341.31, in order to discharge the lien upon the land, and he now seeks to recover that sum with interest from the personal representatives of the original grantor from whom the title was derived.

The plaintiff cannot recover without establishing two propositions of law: (1) That the benefit of the covenant against incumbrances contained in the deed of the defendants' intestate to Knabe passed to the plaintiff through the intermediate conveyances. In other words, that it ran with the land. (2) That the continuity of the covenant was not interrupted or its benefits extinguished as to the plaintiff by the fact that his immediate grantor took the title expressly subject to the assessment or incumbrance which is the basis of the action.

The right of a remote grantee of real estate to recover damages for breach of the covenants in the deed has been exhaustively discussed in a recent case in this court, and the point in that case was settled only after four appeals and then by a bare majority of this court. But in that case the question that we are now concerned with was not involved, since the action was upon the covenant for quiet enjoyment and warranty made by a stranger to the title, and it was held that under the circumstances of the case the covenant of the stranger was personal and did not run with the land. The case turned upon the point that there was no such privity of estate or contract between the husband who had joined with the wife in the covenant and the plaintiff as would attach the covenant to the land and carry liability through the chain of title to a remote grantee. (*Mygatt v. Coe*, 152 N. Y. 457; 147 N. Y. 456; 142 N. Y. 78; 124 N. Y. 212.) That was a very different question from the one now before us, which is simply whether the covenant against incumbrances runs with the land so as to enable a remote grantee to recover upon it.

We can decide the case upon another question, comparatively insignificant, and leave the principal controversy open for litigants to grope their way through conflicting decisions to some conclusion as to what the law is on the subject. But the right of a remote grantee to recover for breach of the covenant against incumbrances is a question arising almost every day, and a court of last resort should meet it when presented and settle the law one way or the other.

It was the general rule of the common law that all covenants for title ran with the land until breach. In this State it has been held that a breach of the covenants of seizin, of right to convey and against incumbrances occurred, if at all, upon delivery of the deed; while those for quiet enjoyment, warranty and for further assurance were not broken until an eviction, actual or constructive. (Rawle on Covenants, [5th ed.,] § 202 and note.) And it has been generally held that those of the former class do not run with the land, while the latter do. The foundation of this distinction is not clearly traceable among the early English decisions. The principal reason for it, however, seems to have been that at common law no privity of estate or tenure existed between a covenantor and a remote covenantee, and, therefore, when a breach of a covenant of title occurred, if it was not such a covenant as was affixed to the land and ran with it, it could not be taken advantage of by a remote covenantee or a stranger to the original covenant, since it was, as to him, a mere chose in action, and at common law choses in action were not assignable. But now choses in action are assignable, and the question is whether the ancient law concerning the covenant against incumbrances has survived the reasons upon which it was founded. The operation of the common-law rule upon the grantee seeking to enforce the covenant against incumbrances was always inconvenient, and the rule itself exceedingly illogical. While it was held that the breach occurred upon delivery of the deed, it was also held that the covenantee could not recover more than nominal damages until he had paid off the incumbrance, or had been actually or constructively evicted. (*Delavergne v. Norris*, 7 Johns. 358; *Hall v. Dean*, 13 Johns. 105; *Stanard v. Eldridge*, 16 Johns. 254; *Grant v. Tallman*, 20 N. Y. 191; *McGuckin v. Milbank*, 152 N. Y. 297.) It was virtually held that when the incumbrance was a money charge which the grantee could remove there were two breaches of the covenant, one nominal, entitling the party to but nominal damages, and the other substantial, to be made good by the actual damages sustained and an action and recovery for the first breach was no bar to an action and recovery for the second. (*Eaton v. Lyman*, 30 Wis. 41; s. c. 33 Wis. 84.)

This rule did not apply to permanent incumbrances which the covenantee could not remove, such as easements and the like, since he had the right in those cases to bring his action immediately on the breach and recover just compensation for the real injury. A learned writer commenting on the condition of the law of covenants as it formerly existed stated the situation quite accurately in the following language: "It is evident from these cases that the current of American authority tends, with but little exception, towards the position that on total breach a covenant, though annexed to the realty, becomes a merely personal right, which remains with the covenantee or his executors, and does not descend with the land to heirs, nor run with it on any future assignment to third parties. The result of this doctrine, as generally applied in this country, is to deprive covenants which, like

those for seizin or against incumbrances, if not good, are broken instantaneously, of all efficacy for the protection of the title, in the hands of an assignee, even when the loss resulting from the breach has fallen solely upon him. Thus the right of action on covenants, originally intended for the benefit of the inheritance in all subsequent hands, is denied under this course of decision, to the purchaser of the land, although the party really injured." (Smith's Leading Cases, vol. 1, p. 192, note by Hare & Wallace.) In England the law became so uncertain in this respect, as the result of conflicting decisions (*Kingdon v. Nottle*, 1 M. & S. 355; s. c. 4 M. & S. 58; *Spoor v. Green*, L. R. [9 Ex.] 99), that the controversy was set at rest by the enactment of a statute which provided that the covenants should run with the land unless otherwise restricted in the conveyance. (44 & 45 Vict. Ch. 41, § 7.) The same result has been accomplished in most of our sister states, either by judicial decision or by statute, where the covenant against incumbrances runs with the land.

In this state, since the enactment of the Code making choses in action assignable, it has been held that the covenant against incumbrances passes with the land through conveyances to a remote grantee. (*Coleman v. Bresnahan*, 54 Hun, 619; *Clarke v. Priest*, 21 App. Div. 174.) But it has been held in the case at bar that it does not, and that proposition is based upon the common-law rule and upon a former decision of the same court. (*S. T. S. Building Company v. Jencks*, 19 App. Div. 314.) With this conflict of views concerning the nature and effect of the covenant against incumbrances, and the remedy for a breach of it, this court should adopt the rule best adapted to present conditions and which seems most likely to conform to the intention of the parties and to accomplish the purpose for which the covenant itself is made. The covenant is for the protection of the title, and there is no good reason why it should not be held to run with the land, like the covenant of warranty or quiet enjoyment. The principle which was at the foundation of the common-law rule, that choses in action were not assignable, having become obsolete, there is no reason that I can perceive why the rule should survive the reason upon which it was founded.

We hold, therefore, that the covenant against incumbrances attaches to and runs with the land and passes to a remote grantee through the line of conveyances, whether there is a nominal breach or not when the deed is delivered.

But in this particular case, there is a fatal obstacle to the plaintiff's right to recover upon the covenant. The plaintiff's immediate grantor, as we have seen, purchased expressly subject to the incumbrance, and while he owned the land he could not take advantage of the original covenant made by the defendants' testator. The effect of his purchase, subject to the assessment, was to relieve the prior grantors from any liability to him on the covenant. Presumptively he was allowed in the purchase to deduct the amount of the assessment from the purchase price and he was, therefore, furnished by his grantor with the money

to pay the assessment, and when he took the land and was furnished with the money to pay the incumbrance the obligation of the covenant was discharged and extinguished. He could not call upon any prior covenantor to pay the assessment, when they had furnished him with the funds to pay it himself. (*Vrooman v. Turner*, 69 N. Y. 280.)

It is true that he did not pay, but conveyed to the plaintiff with a covenant against incumbrances. But the plaintiff acquired only such rights as his immediate grantor could assert against prior grantors. The plaintiff's grantor did not transmit to him any cause of action against the defendants. The covenant in the plaintiff's deed is a new covenant, and not the assignment of an old one. On the new covenant the plaintiff's grantor is liable, but the liability extends only to him and cannot, through him, extend to prior parties. The plaintiff is under the same disability as his grantor, since he is in privity with him.

For these reasons the order should be affirmed and judgment absolute ordered for defendants on the stipulation, with costs.

PARKER, Ch. J., HAIGHT, LONDON, CULLEN and WERNER, JJ., concur;
GRAY, J., concurs in result. *Ordered accordingly.*

C. Covenants by Strangers to the Title.

NOKE v. AWDER.

QUEEN'S BENCH. 1595.

[*Reported Cro. El.* 373, 436.]

COVENANT. Wherein he shows that one John King made a lease for years to A. the defendant, who by deed granted it to Abel, and covenanted with him, that he and his assignees should peaceably enjoy it without interruption. Abel grants it to J. S., who grants the term to the plaintiff, who being ousted by a stranger, brings this action; and after issue joined upon a collateral matter, and after verdict for the plaintiff, it was alleged in arrest of judgment, that this action lay not for the second assignee, unless he could show the deed of the first covenant, and of the assignment, and of every mean assignment; for without deed none can be assignee to take advantage of any covenant, which cannot commence without deed; and to that purpose cited Old Act, 102; and 19 Edw. 2; Covenant, 25. And if one be enfeoffed with warranty to him his heirs and assignees, and the feoffee makes a feoffment over without deed, the assignee shall not take advantage of this warranty, because he hath not any deed of assignment. But if he had the deed, it should be otherwise; and to that purpose *vide* 13 Edw. 3, Vouch. 17; 3 Edw. 3, *Monstrans de Fayts*, 37; 11 Edw. 4,

Ibid. 164; 15 Edw. 2, Ibid. 44; 13 Hen. 7, 13 and 14, 22 Ass. plea, 88. But POPHAM held, that he shall have advantage without the deed of assignment; for there is a difference where a covenant is annexed to a thing, which of its nature cannot pass at the first without deed, and where not. For in the first case, the assignee ought to be in by deed, otherwise he shall not have advantage of the covenant; and therefore he denied the case of the feoffee with warranty; for the second feoffee shall have benefit of the warranty, although he doth not show the deed of assignment, but shows the deed of the warranty; and so is the better opinion of the books. And to that opinion the other Justices inclined. *Sed adjournatur. Vide 3 Co. 68.*

It was now moved again. And all the JUSTICES agreed, that the assignee shall have an action of covenant without showing any deed of the assignment; for it is a covenant which runs with the estate; and the estate being passed without deed, the assignee shall have the benefit of the covenant also: and the executor of the baron, who is assignee in law, who comes in without deed, shall have the benefit of such a covenant, as appears 30 Edw. 3, in *Symkins Simonds' Case*. And POPHAM and FENNER held, that a feoffee shall vouch by a warranty made to his feoffor, without showing any deed of assignment: for the deed of assignment is not requisite, nor is it to any purpose to show it; for it appears by the books, that being shown, it is not traversable by the vouchee. And as a warranty or covenant is not grantable, nor to be assigned over without the estate; so when the estate passeth, although it be by parol, the warranty and covenant ensue it; and the assignee of the estate shall have the benefit thereof. *Coke*, Attorney-General (who was of counsel with the defendant), said, that the law was clear as you have taken it, yet the declaration is ill; for he declares, *quod cum Johannes King*, 10 Eliz., let that to the defendant for years, *virtute cuius* he was possessed, and granted it to Abel by indenture with the covenant, who in 15 Eliz. assigned it to the plaintiff: and further allegeth, that long time before that the said J. K. had anything, one Robert King was seised in fee, viz., 7 Eliz., and so seised, died seised in 15 Eliz. and it descended to Thomas King, who entered upon the plaintiff and ousted him: so he doth not show that John King who made the lease had anything; for Robert King was thereof then seised. And then when John King let to the defendant, and he granted his term by indenture, nothing passed but by estoppel; then the lessee by estoppel cannot assign anything over, and then the plaintiff is not an assignee to maintain this action. But admitting that J. K. had at the time of the lease made by him, a lease for a greater number of years, and that Robert King had the freehold, and thereof died seised, and so all might be true which is pleaded; then the entry of Thomas King upon the defendant is not lawful. So *quacunque via data*, this action cannot be maintained. And this point for the case of estoppel was adjudged in this court, in the case of *Armiger v. Purcas*, in a writ of error.

And all the COURT held here, that it was clear upon the matter shown, that the action lay not; for the plaintiff ought to have shown an estate by descent in J. King, at the time of the lease and assignment made, or an estate whereby he might make a lease, and that this was afterward determined; and so confess and avoid the estate in the lessor, otherwise this action of covenant lieth not; and it never lies upon the assignment of an estate by estoppel. Wherefore they were of opinion to have then given judgment against the plaintiff; but afterward they would advise until the next Term. — NOTE. This was continued until Trin. 41 Eliz., and then being moved again, all the JUSTICES resolved, that the assignee of a lease by estoppel, shall not take advantage of any covenant; but that it shall not be intended a lease by estoppel, but a lawful lease. But no sufficient title being shown to avoid it, it is then as an entry by a stranger without title, which is not any breach. Wherefore it was adjudged for the defendant.¹

ANDREW v. PEARCE.

COMMON PLEAS. 1805.

[Reported 1 B. & P. N. R. 158.]

SIR JAMES MANSFIELD, C. J.² This is an action of covenant, and the declaration states that Peter Best in 1764 demised the premises in question for 99 years to John Garland, and covenanted that he had good right to make such demise, and that Garland should quietly enjoy the premises during the said term; that Garland in 1791 assigned to Bennett, and Bennett in 1801 assigned to the plaintiff, who was ejected by Thomas Pearce under a title superior to that of Peter Best. The plea states that Peter Best, at the time of the demise, was seised of the premises in tail male, and, before the assignment by Bennett to the plaintiff, died so seised without heirs male of his body, whereupon the term of years ceased and determined. Upon these pleadings, it is clear that Peter Best had no power to make a demise of these premises to continue for 99 years if he should die without issue male; but that it was a good lease so long as he should live, and he might have lived till the end of 99 years. On this demurrer every fact is admitted. It is clear, therefore, that at the time when Bennett assigned to Andrew, Bennett had no interest in the premises; the lease is stated to have become absolutely void by the death of Peter Best without heir male. The lease then having become absolutely void, what could be the operation of the assignment by Bennett to Andrew? He could neither assign the lease nor any interest under it, because the lease was gone. What right of any sort had Bennett? If anything, it could only be a

¹ See Rawle, *Cov. for Title* (5th ed.) §§ 232-236; 1 Sm. L. C. (11th ed.) 96 *et seq.*

² Only the opinion is given.

right of action on the covenant, and that could not be assigned by law. As the person who made the assignment had no interest in the premises, the assignment itself could have no operation. Consequently there is no ground upon which the present action can be maintained, and therefore judgment must be given for the defendant.

*Judgment for the defendant.*¹

Lens, Serjt., in support of the demurrer.

Præf., Serjt., *contra*.

BEDDOE v. WADSWORTH.

SUPREME COURT OF NEW YORK. 1839.

[Reported 21 Wend. 120.]

DEMURRER to declaration. This was an action on covenants of warranty and for quiet enjoyment, contained in a deed of land, dated July 7th, 1797, executed by the defendant to John Johnston. Each count (there being six in all) averred that afterwards, viz., on the same day, the defendant by Johnston's direction, and with his consent, surrendered possession of the land to the testator, John Beddoe, who continued in possession until Johnston, on the 16th August, 1802, by indenture, in consideration of one dollar, therein expressed as in hand paid by Beddoe, did "remit, release, and forever quitclaim unto the said John Beddoe, his heirs and assigns forever, all the right, title, interest, claim or demand, which the said John Johnston, &c., had in or to the said tract, &c., to have and to hold the said tract, &c., unto the said John Beddoe, his heirs and assigns forever, to his and their own proper use, benefit and behoof, &c." Each count stated an eviction from part of the premises, while in possession of persons claiming under John Beddoe, the plaintiff's testator, and during the lifetime of the testator. The eviction was alleged to have been in virtue of a title in one Rachel Malin. All the counts except the sixth stated this title to be paramount to the defendant's; and all except the fifth averred that the plaintiff, as executor, had thereby incurred damages and costs. The fifth count averred that the testator in his lifetime, and the plaintiff since his death, had been obliged to pay them.

The first and second counts averred that the defendant's deed to Johnston was given to and received by Johnston for and in behalf of Beddoe, the testator, and for his benefit.

All the counts except the third, concluded as for a breach of the covenant for quiet enjoyment only; the third was for a breach of the covenant of warranty only. But the deed as set forth in each count in fact contained covenants of seisin, of warranty, for quiet enjoyment, and further assurance. The defendant demurred to each count.

¹ Cf. *Cuthbertson v. Irving*, 4 H. & N. 742 (1859).

The demurrers were argued by
J. C. Spencer, for the defendant.
D. B. Prosser, for the plaintiff.

BY THE COURT. (COWEN, J.) If the covenants of warranty and for quiet enjoyment passed by the quitclaim deed from Johnston to the plaintiff's testator, the right of action sought to be shown by the declaration seems to be clear in all the counts except the sixth. This count is defective in not averring that the eviction was by a title paramount to that of the defendant. *Webb v. Alexander*, 7 Wendell, 281; *Luddington v. Pulver*, 6 Id. 404 to 406; *Greenby v. Wilcocks*, 2 Johns. R. 895; *Ellis v. Welch*, 6 Mass. Rep. 246; *per Savage*, C. J., in *Rickert v. Snyder*, 9 Wendell, 421, 422; 4 Kent's Com. 479, 3d ed. *Non constat* but Rachel Malin may have proceeded to eviction upon a right derived from Johnston or the testator himself. In the other five counts, however, there is enough to show that during the lifetime of Beddoe the testator, he either became personally liable on covenants to his grantees as to a part of the premises from which they were evicted by a title superior to the defendant's, or suffered an injury in an eviction of his tenant by a like superior title. Then it is averred either that the plaintiff was compelled to pay damages and costs as executor, or, according to the fifth count, the testator in his lifetime was obliged to pay a part, and the plaintiff another part after his death. In either case, the right of action pertained to the testator personally. The covenant was broken by the eviction, and the whole damages were due (Hosmer, C. J., in *Mitchell v. Warner*, 5 Conn. R. 504 to 506), the right to which passed on his death, not to his heir, but to his personal representative. *Hamilton v. Wilson*, 4 Johns. R. 72. A covenant real ceases to be such when broken, and no longer runs with the land. It would not go to the heir by death, for the same reason that it could no longer follow the land into the hands of a devisee or grantee. See *Markland v. Crump*, 1 Dev. & Bat. 94, 101; *Kingdon v. Nottle*, 1 Maule & Sel. 355; s. c. 4 Id. 53.

This view of the case disposes of all the minor objections raised by the demurrers. There must be judgment for the defendant on the sixth count, and for the plaintiff on all the others, unless either the first or second point taken by the defendant's counsel is sustainable. These are each applicable to the remaining five counts.

The first point is, that it appears from five of the counts, that when the defendant conveyed to Johnston, he, the defendant, had no title; and as no estate therefore passed to the plaintiff's testator, the covenants were not assigned; that covenants pass only as *incidents* to an estate; and if there be none, the covenants cannot be said to be annexed to an estate, much less to pass with it. The point seems to suppose that these covenants can never be transferred where there is a total want of right in the original covenantor, though his deed transfer the actual possession. It seizes on the phrase in 4 Kent's Com. 471, note b, 3d ed., and other books, "that they cannot be separated

from the land and transferred without, but they go with the land as being *annexed to the estate*, and bind the parties in respect to *privity of estate*." No New York case was produced which denies that they pass where the *possession* merely goes from one to another by deed, and there is afterwards a total failure of title; but there are several to the contrary. *Withy v. Mumford*, 5 Cowen, 137; *Garlock v. Closs*, 5 Id. 143, n. And see *Markland v. Crump*, 1 Dev. & Bat. 94; *Booth v. Starr*, 1 Conn. R. 244, 248. Nor, when we take the word *estate* in its most comprehensive meaning, can it be said there is none in such a case to which the covenant may attach. It is said by Blackstone to signify the condition or circumstance in which the owner stands with respect to his property (2 Black. Com. 103), and a mere naked possession is an imperfect degree of title, which may ripen into a fee by neglect of the real owner. Id. 195, 6. It is, in short, an inchoate ownership or *estate* with which the covenants run to secure it against a title paramount; and in that sense is assignable within the restriction insisted upon. It is said in several cases that the covenants of warranty and quiet enjoyment refer emphatically to the *possession* and not to the *title*. *Waldron v. M' Carty*, 3 Johns. R. 471, 3, *per* Spencer, J.; *Kortz v. Carpenter*, 5 Id. 120. The meaning is, that however defective the title may be, these covenants are not broken till the possession is disturbed. When the latter event transpires, an action lies to recover damages for the failure both of possession and title according to the extent of such failure.

The case of *Bartholomew v. Candee*, 4 Pick. 167, was mainly relied upon in support of the ground taken by the first point. All that case decides is, that a covenant no longer runs with the land after it is broken. The declaration was by the grantee of one Thorp, to whom the defendant had conveyed in fee with covenants of seisin and warranty; and breaches were assigned upon both. The defendant pleaded and the jury found, that before the defendant conveyed to Thorp, he had conveyed to one Sparks, who entered and died actually seised, leaving the land to his children, who were still actually seised when the defendant conveyed to Thorp. Mr. Justice Wilde arrives at the conclusion that the covenant of seisin was broken before the deed from Thorp to the plaintiff; and adds: "This point being established, it is perfectly well settled that no action will lie on this contract in the name of the assignee. By the breach of the covenant of *seisin*, an action accrued to the grantee, which, being a mere *chose in action*, was not assignable." He does not notice the covenant of *warranty*, but seems to consider the claim under that as standing on the same ground; which I think might well lie under the pleas as found by the jury. The fair import of these was, that neither Thorp nor the plaintiff ever had possession; so that, according to some cases, the covenant of warranty was also immediately broken; *Duwall v. Craig*, 2 Wheat. 45, 61, 62; *Randolph v. Meak*, Mart. & Yerg. 58; and according to our own it never could have any effect. No possession

ever having been taken under the deed, there could be no actual eviction, which is said to be essential to a recovery upon a covenant of warranty. *Webb v. Alexander*, 7 Wendell, 281 to 284, and the cases there cited; *Jackson ex dem. Montessor v. Rice*, 8 Wendell, 180, 182, per Savage, C. J.; *Vanderkarr v. Vanderkarr*, 11 Johns. R. 122. See a very full collection and consideration of the cases to this point, both as it respects the covenant of warranty and for quiet enjoyment, by Hosmer, C. J., in *Mitchell v. Warner*, 5 Conn. R. 521 to 527. That an unbroken covenant of warranty shall run with the possession of the land, was not questioned by counsel or court in *Bartholomew v. Candee*, nor was it in a subsequent and similar case, *Wheelock v. Thayer*, 16 Pick. 68, also relied upon. I have looked through the other cases cited by the counsel for the defendant, and they all go to the point, either that a covenant broken ceases to be assignable, or that covenants in gross are not so. These positions are indisputably settled; and we have adopted the first, in order to show that this action was properly brought by John Beddoe's executor instead of his heir. I do not except from this remark the case of *Andrew v. Pearce*, 4 Bos. & Pull. 158. It is true that was an action on covenants both that the defendant had authority to demise and for quiet enjoyment. The title failed before the plaintiff took an assignment; he entered and was ousted; and it was held that he could not recover, because the mere failure of the title broke the covenants. Mansfield, C. J., said expressly, the assignor had only a right of action left, which he could not assign. It would seem by this case that in England a simple failure of title, without eviction, would be a breach of the covenant for quiet enjoyment. With us the doctrine is clearly otherwise. *Kortz v. Carpenter*, 5 Johns. R. 120; *Norman v. Wells*, 17 Wendell, 160, and the cases there cited; and see *Mitchell v. Warner*, 5 Conn. R. 497, 522, and the very full reference there to the New York cases. In *Andrew v. Pearce*, the lease was treated as totally gone, by a failure of the title; whereas there was still a continuing possession, till the plaintiff was ousted, and then and not till then, according to our cases, was the covenant for quiet enjoyment broken. There is a difference in more respects than one between our own and the English cases as to what shall constitute a breach of the covenants of title, so as to take away their assignable quality. Even a covenant of seisin, made and broken in the same breath, is there held to run with the land, till actual damages are sustained by the breach. *Kingdon v. Nottle*, 1 Maule & Sel. 355; 4 Id. 58. Kent's Com. 471, 2, 3d ed., says the reason assigned for the decision is too refined to be sound. The case is followed by *Backus' Admr. v. McCoy*, 3 Ham. Ohio R. 211; but severely criticised in *Mitchell v. Warner*, 5 Conn. R. 497 to 505. Kent's Com. *ut supra*, note a.

But secondly, if the covenant be in its own nature available to the assignee as a protection against the total failure of the defendant's title, and if it be assignable by a grant of the land, it is insisted that none

of the counts in the declaration show that such a grant was made from Johnston to the plaintiff's testator. All the counts stop with averring that Johnston, for the consideration of one dollar, *remised, released and forever quitclaimed* to the testator in fee. Technically, these are but words of release; and as no previous lease from Johnston to the testator is shown, it is supposed that the granting words are inoperative. This objection supposes that the words used cannot carry the estate except as part of a conveyance by lease and release; and that, in order to give them effect, a lease should be shown, either by its production and proof, in the usual way, or its recital in the release; and this formal strictness would seem still to prevail in England. *Doe ex dem. Pember v. Wagstaff*, 7 Carr. & Payne, 477. In *Bennett v. Irwin*, 3 Johns. R. 365, 366, Van Ness, J., said, a mere release or quitclaim, unless the releasee is in possession, is void. But the declaration, in the case at bar, shows that the grantee was in possession. Even this strictness was, however, totally exploded, by the case of *Jackson ex dem. Salisbury v. Fish*, 10 Johns. R. 456, the operative words as set forth in the declaration being held of themselves sufficient to raise and execute a use under the Statute. The conveyance was there held good as a bargain and sale. Had that case occurred to counsel, we should doubtless have been saved the examination of this objection; for we do not remember its being denied on the argument that words which are sufficient to pass a fee in conveyancing are equally sufficient in pleading by way of averment.

The demurrers are overruled as to all the counts except the sixth, and judgment must be given for the plaintiff.

The demurrer to the sixth count is well taken, and judgment must be given for the defendant as to that count, with leave to both parties to amend.

SLATER v. RAWSON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1840.

[Reported 1 Met. 450.]

DEWEY, J.¹ This is an action to recover damages for the breach of certain covenants in a conveyance of land made by the defendant to Samuel Slater and John Tyson, through whom, by sundry conveyances, the plaintiffs derive their title as assignees and subsequent purchasers. The covenants in the deed of the defendant are in the usual form, embracing the covenants of seisin and right to convey, a covenant against encumbrances, and also a covenant of warranty. The breach alleged in the declaration is, that one Elisha Jacobs, having an elder

¹ The opinion only is given.

and better title than that of the defendant, entered upon the land, claiming title thereto, and that the plaintiffs, admitting his superior title, voluntarily surrendered the possession to him. To establish the title of Jacobs, the plaintiffs offered in evidence a deed from one John Rawson to William Sears, dated May 6th, 1782, and sundry other deeds conveying this title, as derived from Sears, and vesting it in Jacobs. The defendant admitted that the deed from John Rawson was prior in time, to that under which he claimed to have acquired title; but he contended that the deed of Rawson to Sears did not include the land which the plaintiffs had thus voluntarily surrendered to Jacobs. This presented a question of boundary, and much evidence thereon was submitted to the jury.¹

The only other question, upon which any opinion in matter of law was given at the trial before the jury, was upon the subject of damages. The jury were directed, if they should find for the plaintiffs, to assess the damages at the value of the land at the time of the voluntary surrender of it by the plaintiffs upon the entry by Jacobs, with interest from that time; and this, as we understand, is not denied by the defendant's counsel to be the correct rule for assessing the damages, if the plaintiffs can maintain their action. But upon the argument before us, upon the case as stated by the parties, the defendant insists, that as he was not seised of the land, which is now the subject of controversy, at the time he executed the deed to Slater and Tyson, and so nothing passed by his deed to his immediate grantees, and they therefore could pass no estate, nor any covenants, to an assignee, which would authorize an action in his own name, he is not liable to the plaintiffs, to any extent, on his covenants.

The distinction as to the legal effect of the different covenants usually introduced into our conveyances, however little it may have been understood or regarded prior to the cases of *Marston v. Hobbs*, 2 Mass. 433, and *Bickford v. Page*, 2 Mass. 455, is now very well settled. The covenants of seisin and right to convey are to all practical purposes synonymous covenants; the same fact, viz. the seisin in fact of the grantor, claiming the right to the premises, will authorize both covenants, and the want of it is a breach of both. But upon these covenants no action can be maintained in the name of an assignee or subsequent purchaser; for if broken at all, they are necessarily broken at the moment of the execution of the deed; and not running with the land, they do not pass by a subsequent conveyance of the land. The covenant of warranty, on the other hand, is a covenant running with the land, and may be made available to a subsequent purchaser, however remote, if the conveyances are taken with proper words to pass the covenant. But to support an action by an assignee, on the covenant of warranty, it is necessary that the warrantor should have been seised of the land; for, by a conveyance without such seisin, the

¹ The part of the opinion relating to the question of boundary is omitted.

grantee acquires no estate, and has no power to transfer to a subsequent purchaser the covenants in his deed; because, as no estate passes, there is no land to which the covenants can attach. If therefore the defendant, at the time of the making of his deed to Slater and Tyson, was not seised, then the covenant of warranty did not pass to the plaintiffs as assignees, and the only liability of the defendant is upon his covenant of seisin, which covenant, for the reasons already stated, is wholly unavailable to the plaintiffs.

It is to be taken as established by the finding of the jury, and is also in accordance with the pleadings on the part of the plaintiff, that the defendant, at the time of making his conveyance, had no legal title to the twenty-two acres of land, which the plaintiff has yielded up to the claim of Jacobs; but that the title to the same was then, and had been for a long period previously, in William Sears and those claiming under him. The further inquiry then is, whether the defendant was seised in fact of these premises, claiming right thereto, at the time of executing his deed to Slater and Tyson.

The case, as stated by the parties, in the report, finds that the premises, which are the subject of this controversy, were a part of a large tract of woodland unenclosed by fences, and of which there had been no actual occupation by any of the parties. Taking these facts to be correctly stated, there was clearly no seisin in fact, in the defendant, acquired by an entry and adverse possession. The rule, as to lands that are vacant and unoccupied, that the legal seisin follows the title, seems to be applicable here; and having ascertained in whom is the legal title, that also determines in whom the seisin is. But the plaintiffs have alleged in their declaration, and established by their evidence, the fact that the legal title to the land surrendered was not in the defendant at the time of the execution of the deed by him, but was in those who claim under William Sears. It being thus shown that there was no seisin in fact, nor any legal title to the premises, in the defendant, it necessarily follows that the covenants of seisin and right to convey were broken, and that nothing passed to Slater and Tyson, which they could transfer to the plaintiffs as the foundation of an action in their own name. The covenant of seisin was broken at the moment of the execution of the deed, and became a mere chose in action not transferable; and the covenant of warranty is wholly ineffectual, as no land passed to which it could be annexed; and the result, therefore, from this view of the case, is that the plaintiff cannot maintain his action.

It was said in the argument, that the defendant should be estopped to deny his seisin, and thus avoid the covenant of warranty, because by his own deed he has affirmed it, and that should be conclusive against him. Without deciding whether such estoppel might or might not, under any circumstances, be interposed where there are various covenants in a deed, and the party be thus subjected, at the election of the covenantee, to damages different from those which the law has pre-

scribed for the covenant which is actually broken; or, in the case of an assignee, to allow him to recover for the breach of a covenant which is shown in fact never to have passed to him; it seems to us clear, that in the present case no such objection can avail, as the plaintiff, in his declaration, and by his own showing, has established the fact that the defendant had neither the seisin nor the legal title to the land conveyed.

It was further suggested, upon the argument, that the ground of defence now principally relied on, that the covenant of warranty did not pass to the plaintiffs, in consequence of the want of seisin in the defendant, is not open to the party; not having been presented in this form at the trial before the jury. As a general rule, questions must be raised at the trial, or they will not be open here; and for the very obvious reason, that the opposite party may have the proper opportunity to supply any defects in his proof upon the points excepted to. But as, in the present case, the facts, as stated in the report, and as they appear to be conceded by both parties, show the objection, now urged and relied upon in defence, to be one that could not be obviated by any further proof on the part of the plaintiff, the court have felt themselves authorized to consider that point as open, and have disposed of it in the manner already stated. The result is, therefore, that upon the case as now stated, the plaintiff cannot maintain his action.

*New trial ordered.*¹

Washburn, for the defendant.

C. Allen, for the plaintiffs.

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WEAD v. LARKIN.

SUPREME COURT OF ILLINOIS. 1870.

[Reported 54 Ill. 489.]

APPEAL from the Circuit Court of Cook County; the *Hon. E. S. Williams*, Judge, presiding.

This was an action of covenant, brought by Joshua Larkin and others against George F. Harding and Hezekiah M. Wead. The declaration alleges the breach of a covenant of warranty contained in a deed of conveyance, executed by the defendants to Curtis Worden and Albert Worden, and that the father of the plaintiffs, by conveyance from those grantees, became the assignee of their title, and of the covenant of warranty, and that the plaintiffs succeeded to the same rights by the death of their father.

¹ On the new trial, the case was saved for the consideration of the full court, and it was held, that, the defendant being proved to have been in possession of the land at the time of his deed to Samuel Slater and John Tyson, his covenant ran with the land to their assignees. s. c. 6 Met. 489.

See *Lobby v. Hutchinson*, 72 N. H. 190 (1903).

The form of the covenant counted on is as follows: "And we, the said George F. Harding and H. M. Wead, for ourselves and our heirs, do covenant to and with the said Curtis Worden and Albert Worden, their heirs and assigns, that we will forever warrant and defend the title to said tract of land against all patent titles whatever, and against none other."

A trial resulted in a finding and judgment in favor of the plaintiffs. The case is brought to this court by appeal.

The appellant contends that the action will not lie, because, at the time they executed the deed containing the covenant sued upon, the covenantors were not in actual possession of the land, and had no estate in it of any kind, and therefore the covenant did not run with the land, and the grantee of the immediate covenantee cannot sue.

Mr. J. L. Bennett, for the appellant.

Messrs. Goudy and Chandler, for the appellees.

MR. CHIEF JUSTICE LAWRENCE delivered the opinion of the court:

This case has been twice before this court, and will be found reported in 41 Ill. 415, and 49 Ill. 99. The facts are set forth in the opinion in 41 Ill. and it is unnecessary to repeat them here. After a third verdict and judgment against the defendants in the Circuit Court, they again bring the record here and submit it upon a question which has not hitherto been raised. It is now for the first time claimed, that the action will not lie, because the defendants, at the time they executed the deed containing the covenant upon which they are now sued, were not in actual possession of the land, and had no estate in it of any kind. It is contended, in such cases, the covenants in a deed do not run with the land, because there is no estate to which they can attach, and, therefore, the grantee of the immediate covenantee cannot sue.

It is true, it has been held by the current of authorities, that the covenants of seisin, of a right to convey, and that the land is free from encumbrances, being *in presenti*, if broken at all, are broken as soon as made, and becoming at once mere choses in action, do not run with the land, or, in other words, do not pass to the grantee of the immediate covenantee. But, even on this point, there is some contradiction in the authorities, the King's Bench having held, in *Kingdon v. Nottle*, 1 Maule & S. 355, and 4 Ib. 53, that the assignee might sue, on the ground that the want of seisin is a continuing breach. So, too, it was held in *Admr. of Backus v. McCoy*, 3 Ohio, 211, that the covenant of seisin runs with the land, so long as the purchaser and the successive grantees under him remain in possession, and the rule is enforced by the court with very cogent reasoning.

But if it be true that these covenants *in presenti* cannot be made the basis of an action by the assignee, it is not denied that the covenant of warranty, which is the covenant in the case at bar, runs with the land and protects the grantee of the covenantee. This was settled in *Spencer's Case*, 5 Coke, and has probably never since been denied. It is claimed, however, in behalf of appellant in the present case, that,

although this covenant runs with the land, yet, if the covenantor has neither actual possession nor legal title, there is no estate to which it can attach, and it does not pass to the grantee of the covenantee.

In support of this position, counsel cite the case of *Slater v. Rawson*, 1 Metc. 456, and it must be admitted, this doctrine is there announced. The court say: "To support an action by an assignee, on the covenant of warranty, it is necessary that the warrantor should have been seised of the land, for by a conveyance without such seisin, the grantee acquires no estate, and has no power to transfer to a subsequent purchaser the covenants in his deed; because, as no estate passes, there is no land to which the covenants can attach." It is, however, admitted by the court, that if the covenantor is seised in fact, though without title, the covenant does attach and pass to the assignee, and when the same case came again before the court, at a subsequent term, as reported in 6 Metc. 442, the plaintiff was allowed to recover, on the ground, that the covenantor had cut timber and hoop poles from the land, and thus had such a seisin as caused his covenants to attach to the land and pass to the grantee of the covenantee.

Notwithstanding our great respect for that court, this seems to us a very striking instance of the sacrifice of substance to shadow—the true meaning and spirit of a rule, to the mere form of words in which it has been found convenient to express it.

A reason at least technically sound, whether in fact satisfactory or not, can be given why covenants *in presenti* do not pass to the assignee. The reason assigned for this rule by the courts which maintain it, is, as already stated, that these covenants, if broken at all, are broken as soon as made, and the covenantee thus acquires a mere chose in action, which, under the rules of the common law, cannot pass to an assignee by a conveyance of the land. But not so with the covenant of warranty. That operates only *in futuro*, and is only broken by eviction. It is admitted that it attaches to the land and passes to the assignee, if the covenantor has a seisin in fact, though a wrongful seisin. Why, then, should it not pass to the assignee of the covenantee, if the land is vacant at the time the covenant is made, and the covenantee, as in the present case, enters under his deed and then conveys? If the land were adversely held at the time of the first conveyance, and if the common law, rendering such a conveyance void, were still in force, it might be said, the covenants were void as to the covenantee. But it is admitted in the case at bar, as it was in the Massachusetts case, that the covenant was a valid covenant to the covenantee, even though the covenantor was not in possession of the land. But, it was said, it did not pass to the assignee, because it attached to the estate, and the assignee took no estate. Yet, if a wrongful seisin on the part of the assignor would cause it to attach to the estate, and pass to remote grantees, and if, in the absence of seisin by the covenantor, the covenant was valid to the covenantee, as is admitted, we should like to inquire why, as soon as the covenantee took possession of the vacant land, the covenant did

not then at once attach to the land, and pass with the conveyance of the covenantee? If the question of possession is at all important in reference to the passing of this covenant to an assignee, it is not the possession of the covenantor that is material, but that of the covenantee when he makes his conveyance. Then is the first time that the covenant passes as attached to the estate. When first made, it is made to the covenantee directly and in person, and he takes its benefit by virtue of his contract, and not as an incident to the estate. It can certainly never be held, that if he takes possession and is evicted by paramount title, he cannot recover, because the land was vacant when the deed was made to him. Even then, if we concede that he must take possession before he can pass the covenant to his grantee, as attached to the land, we are wholly unable to see why it does not pass if he has taken possession, or what the possession or non-possession of the covenantor, when the covenant was made, has to do with its passing to the grantee of the covenantee. The cases of *Moore v. Merrill*, 17 N. H. 81; *Beddoe's Exrs. v. Wadsworth*, 21 Wend. 120, and *Fowler v. Poling*, 6 Barb. 166, cited by counsel for appellant, so far from being inconsistent with the position we have here taken, seem rather to support it. The last case was first heard at special term before a single judge, and is reported in 2 Barb. 306. It was held, as in the Massachusetts case, that as the covenantor had no possession, the covenant did not pass to the assignee. An appeal was taken to the General Term, and it was there held, the conveyance by the covenantee in possession passed the covenant to the assignee.

The case of *Nesbitt v. Nesbitt*, 1 Taylor N. C. Rep., also cited by counsel for appellant, was one in which the grantors, by the face of their deed, did not purport to convey their own land, but that of their daughter, and covenanted that she should make good the title on her coming of age. The court held the covenants were collateral to the title, and did not pass to the assignee. The decision is based on the peculiar character of the deed and covenants. The question was, whether the covenants in the peculiar deed before the court could pass to an assignee, and did not turn upon the question of possession.

Our conclusion is, that where the covenantee takes possession and conveys, the covenant of warranty in the deed to him will pass to his grantee, although the covenantor may not have been in possession at the time of his conveyance. This is the case at bar.

It is not, however, to be supposed, because we do not now lay down a broader rule than is required by the case before us, that we hold, by implication, the covenants would not pass if the immediate covenantee should convey before taking possession. On the contrary, it would much better comport with the interests of this State, where vacant lands are so largely an article of commerce, to hold that the covenantor, whether sued by an immediate or remote grantee, is estopped by his deed from denying that he had an estate in the lands to which his covenants would attach, and which would pass by deed. The

covenant, it is true, passes to the assignee as appendant to the land, but this does not mean the actual title to the land, for, in such cases, no covenants would be needed. They are intended as a protection to the covenantee and his assignees, in case the covenantor has no title, and it is a very extraordinary mode of reasoning which leads to the conclusion, that, if the covenantor's want of title is also accompanied by a want of possession, for that reason he should be excused from liability to the remote grantee. We should be inclined rather to say, that although the covenant of warranty is attached to the land, and for that reason is said, in the books, to pass to the assignee, yet this certainly does not mean that it is attached to the paramount title, nor does it mean that it is attached to an imperfect title, or to possession, and only passes with that, but it means, simply, that it passes by virtue of the privity of estate, created by the successive deeds, each grantor being estopped by his own deed from denying that he has conveyed an estate to which the covenant would attach.

In the case at bar, the defendants conveyed to the Wordens, and in their deed covenanted with them, their heirs and assigns, that they would forever warrant and defend the premises against patent titles. The land was then vacant. The Wordens took possession under their deed, and subsequently sold and conveyed to Larkin, and delivered to him the possession. An action of ejectment was brought against him, pending which he died, and his heirs, the present plaintiffs, having been made parties, judgment passed against them, and they were evicted by a paramount patent title. The covenant of warranty in defendant's deed was never broken until then. It was never a mere chose in action in the hands of the immediate covenantees. No one but these plaintiffs has ever had, or can have, a right of action on this covenant. If they cannot have it, the covenant which was inserted in the deed of defendants, in order to give perpetual security to both immediate and remote grantees, has become a dead letter. And why? The only reason that can be given is, because the covenantors, instead of having a partial title or a tortious possession, had no title nor possession of any sort. Their security is to be found in the completeness with which their covenant has been broken. The reasoning does not commend itself to our judgment.

*Judgment affirmed.*¹

¹ *Tillotson v. Prichard*, 60 Vt. 94 (1887), accord. See *Wallace v. Perles*, 100 Wis. 316 (1901).

CHAPTER VIII.¹

ESTOPPEL BY DEED.

LITT. § 446. Also, these words which are commonly put in such releases, *scilicet* (*quæ quovismodo in futurum habere potero*) are as voide in law; for no right passeth by a release, but the right which the releasor hath at the time of the release made. For if there be father and sonne, and the father be disseised, and the sonne (living his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements without clause of warrantie, &c. and after the father dieth, &c. the sonne may lawfully enter upon the possession of the disseisor, for that hee had no right in the land in his father's life (*pur ceo que il n'avoit droit en la terre en la vie son pier*) but the right descended to him after the release made by the death of his father, &c.

Co. Lrr. 265 a. Note, a man may have a present right, though it cannot take effect in possession, but *in futuro*.

As hee that hath a right to a reversion or remainder, and such a right he that hath it may presently release. But here in the case which *Littleton* puts, where the sonne release in the life of his father, this release is void, because he hath no right at all at the time of the release made, but all the right was at that time in the father; but after the decease of the father, the sonne shall enter into the land against his owne release.

The baron makes a lease for life and dieth, the release made by the wife of her dower to him in reversion is good, albeit shee hath no cause of action against him *in presenti*.

"*Without clause of warrantie.*" For if there be a warrantie annexed to the release, then the sonne shall be barred. For albeit the release cannot barre the right for the cause aforesaid, yet the warranty may rebutt, and barre him and his heires of a future right which was not in him at that time: and the reason (which in all cases is to be sought out) wherefore a warrantie being a covenant reall should barre a future right, is for avoiding of circuitie of action (which is not favoured in law); as he that made the warrantie should recover the land against the ter-tenant, and he by force of the warrantie to have as much in value against the same person.

¹ On the subjects of this chapter, consult Rawls, Cov. Tit. (5th ed.) c. 11.

DOE d. CHRISTMAS v. OLIVER.

KING'S BENCH. 1829.

[Reported 10 B. & C. 181.]

BAYLEY, J.¹ This case depended upon the effect of a fine levied by a contingent remainder-man in fee. Ann Mary, the wife of Joseph Brooks Stephenson, was entitled to an estate in fee upon the contingency of her surviving Christian, the widow of Theophilus Holmes; and she and her husband conveyed the premises to Thomas Chandless for ninety-nine years, and levied a fine to support that conveyance. Christian, the widow, died, leaving Mrs. Stephenson living, so that the contingency upon which the limitation of the fee to Mrs. Stephenson depended, happened, and this ejectment was brought by the assignees of the executors of Thomas Chandless, in whom the term for ninety-nine years was vested. It was conceded upon the argument that the fine was binding upon Mr. and Mrs. Stephenson, and all who claimed under them by estoppel; but it was insisted that such fine operated by way of estoppel only; that it therefore only bound parties and privies, not strangers; that the defendant, not being proved to come in under Mr. and Mrs. Stephenson, was to be deemed not a privy, but a stranger; and that as to him, the estate was to be considered as still remaining in Mr. and Mrs. Stephenson. To support this position, the defendant relied upon the latter part of the judgment delivered by me in *Doe dem. Brune v. Martyn*, 8 B. & C. 497; and that part of the judgment certainly countenances the defendant's argument here. The reasoning, however, in that case, is founded upon the supposition that a fine by a contingent remainder-man operates by estoppel, and by estoppel only; its operation by estoppel, which is indisputable, was sufficient for the purpose of that decision: whether it operated by estoppel only, or whether it had a further operation, was quite immaterial in that case; and the point did not there require that investigation, which the discussion in this case has made necessary. We have, therefore, given the point the further consideration it required, and are satisfied upon the authorities, that a fine by a contingent remainder-man, though it operates by estoppel, does not operate by estoppel only, but that it has an ulterior operation when the contingency happens; that the estate which then becomes vested feeds the estoppel; and that the fine operates upon that estate, as though that estate had been vested in the cognizors at the time the fine was levied.

In *Rawlins's Case*, 4 Co. 52, Cartwright demised land, not his, to Weston for six years; Rawlins, who owned the land, demised it to Cartwright for twenty-one years; and Cartwright re-demised it to Rawlins for ten; and it was resolved that the lease by Cartwright,

¹ The opinion only is given.

when he had nothing in the land, was good against him by conclusion; and when Rawlins re-demised to him, then was his interest *bound by the conclusion*; and when Cartwright re-demised to Rawlins, now was Rawlins concluded also. Rawlins, indeed, is bound as privy, because he comes in under Cartwright; but the purpose for which I cite this case is, to show that as soon as Cartwright gets the land, his interest in it is bound. In *Weale v. Lower*, Poll. 54, A. D. 1672, Thomas, a contingent remainder-man in fee, leased to Grills for five hundred years, and levied a fine to Grills for five hundred years, and died. The contingency happened, and the remainder vested in the heir of Thomas, and whether this lease was good against the heir of Thomas was the question. It was debated before Hale, C. J., and his opinion was, that the fine did operate at first by conclusion, and passed no interest, but bound the heir of Thomas; that the estate which came to the heir when the contingency happened fed the estoppel; and then the estate by estoppel became an estate in interest, and of the same effect as if the contingency had happened before the fine was levied; and he cited *Rawlins's Case*, 4 Coke, 53, in which it was held, that if a man leased land in which he had nothing, and afterwards bought the land, such lease would be good against him by conclusion, but nothing in interest till he bought the land; but that as soon as he bought the land, it would become a lease in interest. The case was again argued before the Lord Chancellor, Lord C. J. Hale, Wild, Ellis, and Windham, Justices, and they all agreed that the fine at first inured by estoppel; but that when the remainder came to the conusor's heir, he should claim in nature of a descent, and therefore should be bound by the estoppel; and then the estoppel was turned into an interest, and the cognizee had then an estate in the land. In *Trevivan v. Lawrence*, 6 Mod. 258; Ld. Raym. 1051, Lord Holt cites 39 Ass. 18, and speaks of an estoppel as running upon the land, and altering the interest of it, — as creating an interest in or working upon the estate of the land, and as running with the land to whoever takes it. In *Vick v. Edwards*, 3 P. Wms. 372 (1735), Lord Talbot must have considered a fine by a contingent remainder-man as having the double operation of estopping the conusors till the contingency happened, and then of passing the estate. In that case, lands were devised to A. and B. and the survivor of them, and the heirs of such survivor, in trust to sell: the master reported that they could not make a good title, because the fee would vest in neither till one died. On exceptions to the master's report, Lord Talbot held, that a fine by the trustees would pass a good title to the purchaser by estoppel; for though the fee were in abeyance, it was certain one of the two trustees must be the survivor, and entitled to the future interest; consequently, his heirs claiming under him would be estopped by reason of the fine of the ancestor to say, *quod partes finis nihil habuerunt*, though he that levied the fine had at the time no right or title to the contingent fee. And the next day he cited *Weale v. Lower*. Now, whether Lord Talbot were right in treating the fee

as in abeyance, and the limitation to the survivor and his heirs as a contingent remainder or not, it is evident he did so consider them; and he must have had the impression that the fine would have operated not by estoppel only, but by way of passing the estate to the purchaser, because, unless it had the latter operation as well as the former, it could not pass a good title to the purchaser.

In *Fearne*, c. 6, § 5 (edit. 1820, p. 365), it is said, "we are to remember, however, that a contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency;" and after stating the facts in *Weale v. Lower*, he says, it was agreed that the contingent remainder descended to the conusor's heir; and though the fine operated at first by conclusion, and passed no interest, yet the estoppel bound the heir; and that upon the contingency, the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied.

Upon these authorities we are of opinion that the fine in this case had a double operation,—that it bound Mr. and Mrs. Stephenson by estoppel or conclusion so long as the contingency continued; but that when the contingency happened, the estate which devolved upon Mrs. Stephenson fed the estoppel; the estate created by the fine, by way of estoppel, ceased to be an estate by estoppel only, and became an interest, and gave Mr. Chandless, and those having right under him, exactly what he would have had, had the contingency happened before the fine was levied.

Postea to the plaintiff.

Preston, for the plaintiffs.

N. R. Clarke, contra.

RIGHT d. JEFFERYS v. BUCKNELL.

KING'S BENCH. 1831.

[Reported 2 B. & Ad. 278.]

THIS case was argued during the last term by *Platt* for the plaintiffs, and *Preston* for the defendants, before LORD TENTERDEN, C. J., LITTLÉDALE, J., TAUNTON, J., and PATTESON, J. The facts of the case, the arguments urged, and the authorities cited, are so fully stated and commented on in the judgment pronounced by the court that it is deemed unnecessary to detail them here.

Cur. adv. vult.

LORD TENTERDEN, C. J., in the course of this term, delivered the judgment of the court:—

This case came on upon a motion to enter a nonsuit. At the trial before the *Lord Chief Justice Tindal*, at the Summer Assizes for the

County of Kent, 1830, it appeared that the action was brought to recover two houses at Brompton in the parish of Chatham. As to one the learned judge was of opinion, that the ejectment would not lie for want of a notice to quit. As to the other, there was a verdict for the lessors of the plaintiff, subject to leave to enter a nonsuit. The facts proved were, that Thomas Jarvis the elder, having contracted to purchase the premises, was let into possession by order of the Court of Chancery on the 29th of December, 1808; and being let into possession, but never having had any conveyance executed to him, he afterwards, on the 2d of October, 1820, devised them to his son and heir, Thomas Jarvis the younger. Upon his father's death the son entered, and on the 21st of January, 1823, he mortgaged the premises, by indentures of lease and release, to the lessors of the plaintiff. The lease and release were in the common form, excepting that in the latter there was a recital that the said Thomas Jarvis is legally or *equitably* entitled to the several messuages or dwelling-houses conveyed, and in the covenant for title, the releasor covenanted that he is and standeth lawfully or *equitably*, rightfully, absolutely, and solely seised in his demesne as of fee of and in, and otherwise well entitled to the said several messuages or dwelling-houses, &c. On the 1st and 2d of April, 1824, indentures of lease and release, under the contract of sale in 1808, were executed to Thomas Jarvis the younger, whereby he became seised of the legal estate in the premises, which he afterwards conveyed by mortgage, for a valuable consideration, to the defendant Henry Bucknell. There was no proof that Bucknell had any notice of the prior mortgage, and upon his mortgage all the title-deeds were delivered to him. In this action, he had come in under the common rule, and defended as landlord; the other defendants were the tenants in possession.

The question on which the court took time to consider was, whether the defendant, claiming under the mortgagor, Thomas Jarvis the younger, could set up as a defence against the lessors of the plaintiff, the legal estate acquired by him since their mortgage. And it has been argued for them that he, as representing the mortgagor, Thomas Jarvis, is estopped from doing so; and for this purpose, Co. Lit. 352 a; Lit. § 693; and the cases of *Bensley v. Burdon*, 2 Sim. & Sta. 519; *Helps v. Hereford*, 2 B. & A. 242; *Goodtitle v. Morse*, 3 T. R. 365; *Goodtitle v. Bailey*, Cowp. 597; *Goodtitle v. Morgan and Others*, 1 T. R. 755; *Doe d. Christmas v. Oliver*, 10 B. & C. 181; *Trevivan v. Lawrence*, 1 Salk. 276; 2 Ld. Raym. 1048, s. c.; and *Taylor v. Needham*, 2 Taunt. 278, were cited. Of these cases none are applicable to the point in question, except *Goodtitle v. Morgan* and *Bensley v. Burdon* (of which more presently), and *Helps v. Hereford* and *Doe v. Oliver*. The last two are cases of estoppels, arising out of fines levied before any interest vested; and there is no doubt that a fine may operate by way of estoppel, but the present is not the case of a fine. In § 693, Littleton, speaking with reference to the doctrine of remitter, says, "This is a remitter to him, if such taking of the estate be not by

deed indented, or by matter of record, which shall conclude or estop him ;" and in Lord Coke's commentary on this passage, a deed indented is distinguished from a deed poll in this particular of remitter, for the deed poll is only the deed of the feoffor, donor, and lessor, but the deed indented is the deed of both parties, and, therefore, as well the taker as the giver is concluded. In 352 a, Lord Coke divides estoppels into three sorts, the second of which he thus defines: "By matter in writing, as *by deed indented*, by making of an acquittance by deed indented or deed poll, by defeasance by deed indented or deed poll." And there are many other authorities to show that estoppel may be by any indenture or deed poll. But upon this rule there are many qualifications and exceptions engrafted. It is a rule, that an estoppel should be certain to every intent, and, therefore, if the thing be not precisely and directly alleged, or be mere matter of supposal, it shall not be an estoppel; nor shall a man be estopped where the truth appears by the same instrument, or that the grantor had nothing to grant, or only a possibility; Co. Lit. 352 b, where this case is put: "An impropriation is made after the death of an incumbent, to a bishop and his successors. The bishop, by indenture, demiseth the parsonage for forty years, to begin after the death of the incumbent. The dean and chapter confirmeth it. The incumbent dieth. This demise shall not conclude, for that it appeareth that he had nothing in the impropriation till after the death of the incumbent." This passage from Co. Lit. is adopted by Ch. B. Comyns in his Digest, Estoppel (E. 2). Now in the case at bar the very truth, that the mortgagor, Thomas Jarvis the younger, had only an equitable interest, is partly admitted; for the recital states in the alternative, that he is lawfully or *equitably* entitled, and the covenant for title is to the same effect. At all events, there is in this recital a want of that certainty of allegation which is necessary to make it an estoppel. Lord Holt lays it down in *Salter v. Kidley*, 1 Show. 59, that general recital is not an estoppel, though a recital of a particular fact is. And upon this the judgment of the Lord Chancellor in the recent case of *Bensley v. Burdon*, which was relied upon by the counsel for the lessors of the plaintiff, proceeded. The deed of release in that case recited, that Francis Tweddle the younger was, subject to his father's life estate, seised or possessed of, or well entitled to, the lands and tenements thereafter mentioned in reversion or remainder; and by the deed he granted and released this remainder, and covenanted that he was seised of it for an indefeasible estate of inheritance. The present Master of the Rolls, then Vice-Chancellor, by whom this case was first decided, according to the report in 2 Sim. & Stu. 519, held, that this was an estoppel, upon the general ground that it was a deed indented, and that the nature of the conveyance, namely, lease and release, made no difference. The Lord Chancellor confirmed this judgment, 5 Russell's Ch. Rep., but put it on this solely, that it was an allegation of a particular fact, by which the party making it was concluded. That case, therefore, greatly differed from the present, in

which there is no certain precise averment in the deed of release of any seisin in T. Jarvis the younger, but a recital only, that he was legally or equitably entitled. We think, therefore, that this recital does not operate by way of estoppel.

We are of opinion, also, that the release whereby T. Jarvis granted, bargained, sold, aliened, remised, released, &c., the premises, does not by mere force of these words amount to an estoppel. Littleton lays it down, § 446, that "no right passeth by a release, but the right which the releasor hath at the time of the release made. For if there be father and son, and the father be disseised, and the son (living his father) releaseth by his deed to the disseisor all the right which he hath, or may have, in the same tenements, without clause of warranty, &c., and after the father dieth, &c., the son may lawfully enter upon the possession of the disseisor." To the same effect is *Wivel's Case*, Hob. 45, and Perk. § 65, that where a son and heir joins in a *grant* in the lifetime of his father, while he has neither possession nor right in the matter granted, the grant is utterly void, and nothing passes. So here, if the release pass nothing but what the releasor lawfully had, and he had no legal title in the premises at the time of the release made, those who claim under him by a subsequent good title are at liberty to show this; and there is no implied estoppel, as appears from the authorities just cited, and the Year Books 49 Ed. 3, 14, 15; 45 Ass. 5; 46 Ass. 6; and Brook's construction of these books in his Abr. tit. Estoppel, pl. 146; 10 Vin. Abr., Estoppel (M).

The case was put in argument on another ground for the lessors of the plaintiff, namely, that it was within the common rule that a mortgagor cannot dispute the title of his mortgagee. Such a rule without reference to the technical doctrine of estoppel, undoubtedly is to be met with as laid down by Lord Holt, in *Salkeld*, and has been often recognized in modern times. But we are of opinion that it does not apply to the present case. Here, the defendant Bucknell claims, as a purchaser for a valuable consideration without notice, a legal interest which was not in T. Jarvis at the time of his mortgage to the lessors of the plaintiff, and T. Jarvis had then an equitable interest which passed to them, and which is not questioned, nor sought to be disturbed by the defence which Bucknell sets up. This case much resembles that of *Goodtitle v. Morgan*, where a second mortgagee without notice, who got in the legal title, by taking an assignment, from a trustee and the mortgagor, of an outstanding term assigned to attend the inheritance, was holden entitled to a legal preference against the first mortgagee.

There, as here, it might be said that he was bound by the same conclusion as the mortgagor, and should not question the right of the prior mortgagee. But the legal title prevailed there, and so we think it ought here. The consequence upon the whole is, the rule for entering a nonsuit must be absolute.

*Rule absolute.*¹

¹ See *General Finance Co. v. Liberator Building Soc.*, L. R. 10 Ch. D. 15 (1878); *Van Rensselaer v. Kearney*, 11 How. 297, 322 (U. S. 1850); *Hagensick v. Castor*, 63 Neb. 496 (1898); *Flanary v. Kane*, 102 Va. 547, 566 (1904).

STURGEON v. WINGFIELD.

EXCHEQUER. 1846.

[*Reported 15 M. & W. 224.*]

THIS was an action of covenant, charging the defendant as the assignee of the estate of J. H. Hogarth, the lessor of a certain leasehold farm, with breach of covenant, in preserving, and not using his best endeavors to destroy, the rabbits upon the estate in question. The declaration stated, that on the 22d of May, 1828, by a certain indenture of lease, sealed, &c., made between the Rev. John Henry Hogarth of the one part, and the plaintiff of the other, the said J. H. Hogarth demised to the plaintiff a certain messuage and lands in Essex, for twenty-one years; that J. H. Hogarth did, for himself, his heirs and assigns, covenant, that the rabbits on the said farm were not to be preserved, but that he and they would use their best endeavors to kill and keep down the rabbits on the said lands; that the plaintiff entered, and was possessed thereof for the said term so demised, the reversion thereof belonging to the said John Henry Hogarth, and that the reversion, during the continuance of the said demise and term, to wit, on the 1st of January, 1835, by assignment thereof came to and legally vested in the defendant. Breach, that the defendant did not use his best endeavors to kill, destroy, and keep down the rabbits on the said lands. The defendant pleaded, among other pleas, first, that the said J. H. Hogarth did not demise to the plaintiff; secondly, that the reversion mentioned in the declaration never legally vested in the defendant.

The cause came on for trial before *Pollock*, C. B., at the Middlesex Sittings after Trinity Term, 1845, when a verdict was found for the plaintiff for the damages in the declaration, subject to the opinion of this court upon the following special case, and to a reference as to the amount of damages, if the decision of the court should be in favor of the plaintiff.

On the 22d of May, 1828, the indenture of lease in the declaration mentioned, being of a farm at Stifford, in Essex, for twenty-one years from the 24th of June then last past, at a yearly rent of £221 7s. 6d., was duly executed by the lessor, the Rev. John Henry Hogarth, in the declaration mentioned, and by the plaintiff, the lessee. The plaintiff entered into possession of and still holds the farm under the lease, and he paid the rent reserved to the lessor Hogarth, up to Christmas, 1835; and from that period he has continued to pay to the defendant rent under the lease, and the defendant has treated the plaintiff as his tenant of the farm in question. For several years past, the plaintiff has complained that the rabbits on the farm have not been kept down, and that, in consequence, his crops have been very much damaged, and much

correspondence has taken place between the plaintiff and defendant as to the amount of damage.

[The case then set forth two letters from the defendant to the plaintiff, in which the former expressed his willingness, on certain terms, to make compensation for the injury done by the rabbits.]

The farm in question was, by an indenture made and dated the 12th of May, 1742, demised by the keepers or wardens and society of the art or mystery of the Broderers of the city of London, to Samuel Foster, for the term of 100 years from Michaelmas, 1741, with a covenant for perpetual renewal. On the 25th of August, 1827, the residue then unexpired of that term became vested in William Bray, who, by an indenture made and dated the 25th of August, 1827, assigned the said residue of the said term, the same being then vested in him, to Richard Fleming, Thomas George Vander Gucht, James Elmslie, and William Green, by way of mortgage, to secure £5000 and interest, with a proviso for redemption on payment within twelve months. After the said residue of the said term had become thus vested in the said Richard Fleming, Thomas George Vander Gucht, James Elmslie, and William Green, the indenture of lease mentioned in the declaration was made. After the making of the indenture of lease mentioned in the declaration, an indenture, dated the 12th of January, 1836, was that day made between the said R. Fleming and the said James Elmslie of the first part, the said Thomas George Vander Gucht and (the said W. Green being then dead) the said John Henry Hogarth of the second part, William Wingfield of the third part, and Richard Baker Wingfield of the fourth part, and the said keepers or wardens and society of the art or mystery of the Broderers of the city of London of the fifth part; by which last-mentioned indenture, the said Richard Fleming, James Elmslie, and John Henry Hogarth, and each of them, purported to assign, surrender, and yield up, demise, release, and quitclaim, unto the said keepers or wardens and society, and their successors and assigns, the said farm, with the appurtenances, together with certain hereditaments and premises therein mentioned, for all the remainder then to come and unexpired, trust, possession, property, benefit of renewal, claim, and demand whatsoever, both at law and in equity, of them the said Richard Fleming, James Elmslie, and John Henry Hogarth, and every of them, of, in, to, or out of the said farm and appurtenances, and any and every part or parcel thereof, and also the covenant contained in the said indenture in the declaration mentioned for the renewal or re-grant of the lease or demise of the said farm, and all and every other covenant or covenants, if any then existing, in or in respect of any former or prior lease of the said term, or otherwise howsoever, to the intent that the residue then to come of the said term might be merged and extinguished in the reversion of the said farm, and that the said covenant or covenants for renewal might be absolutely and forever extinguished, determined, and discharged. After the making of this indenture of January 12th, 1836, the said keepers or

wardens and society of the art and mystery of Broderers of the city of London, by an indenture made and dated January 13th, 1836, demised the same farm to the said John Henry Hogarth, for the term of 100 years from Michaelmas, 1835; and by an indenture, made and dated February 4th, 1836, the unexpired residue of the said term became and was, and thence hitherto has been, vested in the defendant.

The leases, indentures, and documents mentioned in this case, and also the pleadings in the action, are to form part of the case, and are to be considered as embodied in it.

The question for the opinion of the court is, whether the plaintiff is entitled to a verdict on the two first issues, or either of them. If on both, the verdict is to stand, and the amount of damages to be referred; and if only on one of those issues, or on neither, a nonsuit is to be entered. The court is to be at liberty to draw the same conclusions and inferences of fact as a jury might have done.

Cowling, for the plaintiff.

Peacock, for the defendant.

PARKE, B. On the first issue, the verdict clearly must be entered for the plaintiff, that there was such a demise to him as is stated in the declaration. Then, as to the second point, all the reversion of Hogarth, which was a reversion by estoppel, passed from him to the defendant. This estoppel was fed by the demise for one hundred years from the Broderers' Company to Hogarth, the lessor, and thereby the lease from him to the plaintiff became good in point of interest. That lease for 100 years was afterwards assigned to the defendant, and therefore the second issue also ought to be found for the plaintiff.

ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

HOYT v. DIMON.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1818.

[Reported 5 Day, 479.]

MOTION for a new trial.

This was an action of *disseisin*, for a parcel of land in Newtown. The defendant pleaded the general issue.

On the trial, the plaintiff claimed title to the demanded premises, by virtue of the levy of an execution in his favour against one Austin Nichols; which levy was made on the 17th of April, 1810.

The defendant claimed title, by force of a mortgage deed from Austin Nichols to one Philo Norton, dated the 22d of September, 1797. This deed was given to secure the payment of four promissory notes, of fifteen hundred dollars each, one of which was made payable in one year

after the date and execution of the deed. There was a regular series of conveyances, through sundry persons, from Norton to the defendant.

It also appeared, that one Daniel Nichols was the owner of the premises, until the 25th of September, 1797, when he, by deed, containing the usual covenants of seisin and warranty, conveyed the same to Austin Nichols; and that, on 8th of January, 1798, Austin Nichols, by an absolute deed, conveyed the land to Norton.

It was contended in behalf of the plaintiff, that both the mortgage deed, and the absolute deed from Austin Nichols to Norton, were given for the purpose of enabling him to avoid the claims of his creditors; and were, therefore, void, by the provisions of the statute against fraudulent conveyances.

The plaintiff, also, contended, that if the evidence of fraud exhibited on the trial, in relation to the execution of these deeds, was insufficient to shew, that the mortgage deed was fraudulent; yet, if it was sufficient to prove, that the subsequent absolute deed was void, it destroyed the defendant's title. He, therefore, claimed, that as the absolute deed was executed and delivered before the estate became vested in the mortgagee, at law, the mortgage title was superseded; and that the defendant held possession, by virtue of the absolute deed only.

It was also contended, that nothing passed to Norton, by the mortgage deed of Austin Nichols, he having no interest in the land, at the time of the execution and delivery of the deed; his right having been acquired subsequently, by the deed of Daniel Nichols.

The court, in their charge, instructed the jury, that the only material fact for them to find, was, whether the mortgage deed from Austin Nichols to Norton, was fraudulent; if so, that they must find their verdict for the plaintiff; if otherwise, that they must find for the defendant. The jury returned their verdict for the defendant: And the plaintiff moved for a new trial, on the ground of a misdirection; which motion was reserved for the opinion of the nine judges.

R. M. Sherman, in support of the motion.

Daggett and N. Smith, contra.

BALDWIN, J. From the statement of this case, it is apparent, that the right of the plaintiff to recover, depends on his shewing, that no title was derived to the defendant, by either of the deeds. If either conveyed a valid title, the defendant was entitled to a verdict.

As the jury found the mortgage deed not to be fraudulent, and thereupon, gave their verdict for the defendant, the plaintiff cannot claim a new trial, on the ground, that the last deed was not submitted to their consideration; nor on the ground, that the direction given them was incorrect, unless, the law be so, that the mortgage deed, though not fraudulent, was of no effect for want of title in the grantor, at the time of its execution, and could not be made valid by subsequent title; or that the mortgage title was destroyed, by the subsequent absolute deed. The court, when they charged the jury, must have considered the mortgage as legal and valid, unless made void, by the statute against fraud-

ulent conveyances; which, as a question of fact, they submitted, with the evidence, to the jury. I am of the same opinion.

It has been decided, in Connecticut, in conformity, I conceive, to the principles of the common law, that a grantor, with warranty, but without title, is estopped from denying his former title, or claiming under a subsequent one; and such covenants running with the land, this estoppel will affect and bind all those who claim under the grantor; of course, in this case, Austin Nichols, and the plaintiff, who claims under him, are estopped from setting up the subsequent title derived from Daniel Nichols, to defeat the mortgage deed. *Town of Norwich v. Congden*, 1 Root's Rep. 222; Co. Litt. 265; *Trevivan v. Lawrence*, 6 Mod. 258; s. c. Salk. Rep. 276; *Palmer v. Ekins*, 2 Ld. Raym. Rep. 1551. The subsequent title will thus enure to the benefit of the first grantee. The mortgage, then, is valid, unless defeated by the absolute deed from Austin Nichols to Philo Norton, the mortgagee. This, it is claimed, absorbed the mortgage though void as to creditors, it being good between the parties. [The court held that the mortgage title was not destroyed by the subsequent absolute deed.]

All the other Judges concurred in this opinion, except *Edmond* and *Ingersoll, Js.*, who did not judge.

*New trial not to be granted.*¹

¹ The doctrine is established by numerous decisions in the United States that if A., having no title or an imperfect title, conveys to B., with covenant of general warranty, and A. thereafter acquires title or perfects his title, such after-acquired title will inure to the benefit of B., and will be legally vested in B. forthwith without a second conveyance by A.

The same effect has been given to other covenants. Thus to a covenant of special warranty. *Kimball v. Blaisdell*, 5 N. H. 583 (1831). But the after-acquired title must come from a source covered by the covenant. *Bell v. Twilight*, 26 N. H. 401 (1853); *Huzzey v. Heffernan*, 143 Mass. 232 (1887); *Bennett v. Davis*, 90 Me. 457 (1897). Of non-claim. *Trull v. Eastman*, 3 Met. 121 (Mass. 1841); *Garlick v. Pittsburgh, etc., Railway Co.*, 67 Ohio St. 228 (1902). *Contra, Pike v. Galvin*, 29 Me. 183 (1848). See also *Jackson v. Bradford*, 4 Wend. 619 (N. Y. 1830). Of further assurance. *Bennett v. Waller*, 23 Ill. 97, 183 (1859). But see *Hope v. Stone*, 10 Minn. 141 (1865). Of right to convey. *Foss v. Strachn*, 42 N. H. 40 (1860). But cf. *Doane v. Willcutt*, 5 Gray, 328 (Mass. 1855).

It is frequently said that this effect is given to the covenants in order to avoid circuity of action, but such effect has been given, even though no suit could be brought against the grantor on the covenants. Thus of a conveyance with covenants by a married woman. *Hill v. West*, 8 Ohio, 222, 226 (1837). *Jackson v. Vanderheyden*, 17 Johns. 167 (N. Y. 1819), *contra*. As to the effect of covenants in a conveyance by a State, see *Commonwealth v. André*, 8 Pick. 224 (Mass. 1825). And such effect has also been given to the covenants where the grantor has been relieved from liability thereon by a discharge in bankruptcy, *Bush v. Cooper*, 18 How. 82 (U. S. 1855); or by the statute of limitations, *Cole v. Raymond*, 9 Gray, 217 (Mass. 1857). But see *Webber v. Webber*, 6 Greenl. 127, 136-139 (Me. 1829). Cf. *Goodell v. Bennett*, 22 Wis. 565 (1868).

When the grantor conveys "his right, title and interest" by a quitclaim deed, meaning to pass only his present interest, there is no estoppel preventing him from asserting any after-acquired title. *Comstock v. Smith*, 18 Pick. 116 (Mass. 1882); *Wight v. Shaw*, 5 Cush. 56 (Mass. 1849); *Miller v. Ewing*, 6 Cush. 34 (Mass. 1850). So, even though there be a covenant of warranty in such deed. *Hanrick v. Patrick*, 119 U. S. 156 (1886). Rawle, Cov. Tit. (5th ed.) § 270.

BAXTER v. BRADBURY.

SUPREME JUDICIAL COURT OF MAINE. 1841.

[Reported 20 Me. 280.]

COVENANT broken, for breach of the covenant of seisin in a deed of warranty from the defendant to the plaintiff, dated August 3d, 1835. In this deed many lots of land were conveyed, and several in Corinth were described. To prove the breach of the covenant declared on, the plaintiff read a deed of warranty from John Peck to Benjamin Joy, conveying the town of Corinth, with certain reservations, dated July 27th, 1799. The land in controversy was part of the land conveyed to Joy. The plaintiff proved the consideration paid for these lots, and there rested his case.

The defendant then read a deed of mortgage, dated August 3d, 1835, from the plaintiff to him, of the same premises to secure the payment of certain notes; and a deed of quitclaim of the same premises from the plaintiff to Chester Baxter, dated July 31, 1837. To prove a seisin in the plaintiff, and also for the purpose of reducing the damages, the defendant offered in evidence a deed of quitclaim from Amos Whitney to him of one of the lots, dated August 24, 1835, and the warranty deed of Thomas Whitten, dated the same day, of another lot, and offered evidence to show that the grantors were then in possession. To the introduction of this evidence the plaintiff objected, and *Emery, J.*, presiding at the trial, ruled it to be inadmissible, and rejected it. The defendant also offered the contract of Joy, dated in June, 1835, to convey certain of the lands in controversy to the defendant, and a deed of the same from the heirs of Joy, dated Oct. 20, 1837, after this action was commenced, but the judge rejected it. The defendant then offered to prove that the lots were of less value than the purchase-money. This evidence was rejected.

A default was then entered by consent, and the damages assessed at the amount of the consideration and interest, under an agreement, that if in the opinion of the whole court, the evidence rejected should have been admitted, the default was to be taken off, and the action stand for trial.

J. Appleton, for the defendant.

Rogers and Cooley, for the plaintiff.

The opinion of the court was by

WESTON, C. J. It is assumed in argument that Amos Whitney and Thomas Whitten were seised of the lands described in their respective deeds to the defendant, dated August 24, 1835. The lands constitute a part of that, which is the subject-matter of this suit. These deeds, with the evidence of their seisin, were rejected as inadmissible, by the presiding judge at the trial. If this evidence could legally have any

effect upon the right of the plaintiff to recover, or upon the measure of damages, it ought not to have been rejected.

The rules, which have been established to determine the measure of damages, upon the breach of covenants in deeds for the conveyance of real estate, have been framed with a view to give the party entitled a fair indemnity for damage he has sustained. Thus if the covenant of seisin is broken, as thereby the title wholly fails, the law restores to the purchaser, the consideration paid, which is the agreed value of the land, with interest. But in this, as well as in other covenants, usual in the conveyance of real estate, if there exists facts and circumstances, which would render the application of the rule inequitable, they are to be taken into consideration by a jury. *Leland v. Stone*, 10 Mass. R. 459. The covenant was intended to secure to the plaintiff a legal seisin in the land conveyed. If it is broken and he fails of that seisin, he has a right to reclaim the purchase-money. But if in virtue of another covenant in the same deed, which was also taken to assure to him the subject-matter of the conveyance, he has obtained that seisin, it would be altogether inequitable that he should have the seisin, and be allowed besides to recover back the consideration paid for it. The rule as to the measure of damages for the breach of this covenant, which is just in its general application, could never be intended to apply to such a case. In *Whiting v. Davey*, 15 Pick. 428, it is strongly intimated by the court, that this rule may have exceptions, as it undoubtedly has.

If Whitney and Whitten were seised, immediately upon the execution of their deeds, which were executed a few days after that, upon which the plaintiff declares, their seisin at once inured and passed to him, in virtue of the covenant of general warranty in his deed. *Somes v. Skinner*, 8 Pick. 52. It has been insisted by the counsel for the plaintiff that this effect depends upon the election of the grantee, and that the plaintiff here would reject the title arising by estoppel. But we are aware of no legal principle, which can sustain this position. In the case last cited, the court say, "that the general principle to be deduced from all the authorities is, that an instrument, which legally creates an estoppel to a party undertaking to convey real estate, he having nothing in the estate at the time of the conveyance, but acquiring a title afterwards by descent or purchase, does in fact pass an interest and a title from the moment such estate comes to the grantor." The plaintiff by taking a general covenant of warranty, not only assented to, but secured and made available to himself, all the legal consequences, resulting from that covenant. Having therefore under his deed, before the commencement of the action, acquired the seisin, which it was the object of both covenants to secure, he could be entitled only to nominal damages, and in our judgment the evidence rejected was legally admissible. The estoppel, being part of the title, may be given in evidence, without being pleaded. *Adams v. Barnes*, 17 Mass. R. 365. Whether the seisin of Whitney and Whitten was

defeasible or indefeasible, is not a question which can arise under this covenant, which operates only upon the actual seisin and does not assure the paramount title.

The same course of reasoning, and the same authorities, which justified the admission of the testimony rejected, required that the evidence of title derived by estoppel from Joy's heirs, should have been received.

It has been objected, that these lands may have been devised by Joy, which may have prevented a descent to the heirs. But an estate in fee, upon the decease of the ancestor, is presumed to descend, in pursuance of the laws of inheritance, unless the descent is shown to have been intercepted by a devise. By the conveyance from Joy's heirs to the defendant, the plaintiff acquired not only the seisin, but an indefeasible title. As, however, that was executed, since the commencement of the action, the plaintiff is entitled to nominal damages, and to nothing more, if he has not been disturbed in his possession; and judgment may be rendered for him therefor on the default, which has been entered. But if the actual seisin of Whitney and Whitten is intended to be contested, or the plaintiff would show that he had been dispossessed, before his title by estoppel attached, the default must be taken off, and the action stand for trial.¹

BLANCHARD v. ELLIS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1854.

[Reported 1 Gray, 195.]

ACTION of contract on the covenant against encumbrances, contained in a deed from the defendants to the plaintiff, dated the 9th of November, 1838, purporting to be made in consideration of the sum of \$5,520, and to convey "one undivided quarter part of the east half of township numbered three in the eighth range of townships in the County of Penobscot and State of Maine," with the usual covenants of warranty. The declaration set forth the execution and delivery of the deed; and then alleged that, at the date of the execution thereof, the land therein described was not free from encumbrances, but was under an attachment, made on the 18th of February, 1836, in an action brought by Wiggins Hill against James T. Hobart, then owner of the premises, and from whom the defendants derived their title; that in said action Hill, on the 6th of November, 1838, recovered judgment for the sum of \$52,755.39; and on said judgment execution issued, and was duly levied upon said land on the 25th of December, 1838; and seisin and possession of said land was delivered to Hill,

¹ *McLennan v. Prentice*, 86 Wis. 427, 433 (1893), accord.

the judgment creditor, and received by him. Writ dated October 18th, 1851.

At the trial before *Bigelow, J.*, there was evidence tending to prove the facts stated in the declaration, and also the following facts: The amount of the execution was much greater than the value of the land levied upon, which was the whole of the east half of the township, of which the land conveyed to the plaintiff constituted an undivided quarter part; and by virtue of the levy the title to the east half of said township became absolutely vested in Hill in one year from the date of the levy; and he continued in possession of the land levied upon until the 4th of December, 1848, when he made a deed to the defendants of the portion included in their deed to the plaintiff, expressed to be in consideration of \$1,100, and with the usual covenants of warranty. In February, 1841, the defendants gave notice to the plaintiff of this failure of title, and offered to transfer to him certain stock by way of indemnity for his loss. During the time that Hill remained in possession of said half township, he received the sum of four hundred dollars net for stumpage. The plaintiff offered no evidence, beyond what has already been stated, to show that the premises were more or less valuable than at the date of the deed from the defendants to him; or that anything had been realized or received therefrom, except said stumpage.

The case was taken from the jury by consent of parties, and reserved for the consideration of the full court, with the agreement that if the court should be of opinion, upon the foregoing facts, that the plaintiff was entitled to recover nominal damages only, judgment should be rendered in his favor for one dollar; to which should be added the sum of one hundred dollars, if the court should be of opinion that the plaintiff was entitled to any part of the stumpage received by Hill; and that if the court should be of opinion that the plaintiff was entitled to recover any other or further damages, the case should be sent to a jury for trial and for the assessment of such damages, on principles to be determined by the court.

W. H. L. Smith, for the plaintiff.

C. M. Ellis, for the defendants.

THOMAS, J. It is not doubted that the facts of this case establish a breach of the defendants' covenant; but the question at issue between the parties is as to the measure of damages.

The defendants say, that a deed of the premises having been made to them by Hill, on the 4th of December, 1848, the title so conveyed to them inured, by way of estoppel, to the plaintiff, and is now in him, and that the only damages he can recover are nominal, or his quarter of the stumpage of the entire tract; such stumpage constituting the only rents and profits of the estate during the eviction of the plaintiff, or the difference, if any, between the value of the land at the time of the conveyance by the defendants to the plaintiff, and its value at the time of the conveyance by Hill to the defendants.

The general doctrine, on which the defendants rely, is quite familiar; that if A., having no title, make a deed of land to B., with full covenants of warranty, and A. subsequently acquire a title by descent or purchase, he is estopped by his covenants, as against his grantee, to deny that he had a good title at the time of his grant, and such new title is said to inure to his grantee. Strictly speaking, there would seem to be no transmutation of estate when the new title comes to the grantor. Nor is there any force in the original deed to convey a title not then existing in the grantor; for nothing can pass but his then existing title. But the grantor and those claiming under him are estopped to deny the validity of the title, which he has solemnly asserted, and to set up a title against it. The law presumes that he has spoken and acted according to the truth of the case, and will not permit him or those claiming under him to deny it. "The reasons," says Mr. Butler, in a note to Co. Lit. 352 a, "why estoppels are allowed, seem to be these: No man ought to allege anything but the truth for his defence, and what he has alleged once is to be presumed true, and therefore he ought not to contradict it; for, as it is said in the 4 Inst. 272, *allegans contraria non est audiendus*." It might be curious to trace the progress of this doctrine of estoppel, as applicable to the covenant of warranty, from the simple rebutter of Lord Coke (Co. Lit. 265 a), which should bar a future right, to avoid a circuity of action, to its present condition, in which there is claimed for it the full force of a feoffment, or fine or common recovery at the common law; that is, having the function of actually divesting the feoffor or conusor of any estate which he might thereafter acquire. But waiving, because not necessary to our purpose, the discussion of the origin and extent of the doctrine of estoppel, it will be sufficient to say that we do not feel called upon to extend its application; especially when such extension would tend to defeat the principle on which the doctrine of estoppel rests, which is the prevention of wrong and injustice.

Supposing it to be well settled that, if a new title come to the grantor before the eviction of his grantee, it would inure to the grantee, and not deciding, because the case does not require it, whether the grantee, even after eviction, might elect to take such new title, and the grantor be estopped to deny it; we place the decision of this case on this precise ground, that where a deed of land has been made with covenants of warranty, and the grantee has been wholly evicted from the premises by a title paramount, the grantor cannot, after such entire eviction of the grantee, purchase the title paramount, and compel the grantee to take the same against his will, either in satisfaction of the covenant against encumbrances, or in mitigation of damages for the breach of it.

We do not seek a better illustration of the soundness of this principle than is furnished by the facts of this case. The land, for which the consideration stated in the deed was \$5,520, was under attachment in a suit in which judgment had been recovered for more than fifty

thousand dollars; the entire tract, of which one quarter had been conveyed to the plaintiff, was afterwards levied upon, seisin given to the creditor, and the plaintiff wholly evicted. He had no estate or interest left. The covenant against encumbrances being personal, and not running with the land, he had nothing which could pass by deed. He could not redeem his undivided quarter, without a redemption of the entire estate. He could not, for a period of ten years, enter upon the land, without committing a trespass. The defendants admit the existence of the title paramount, and the eviction of the plaintiff; but contend, after the eviction has continued ten years, that they, as grantors, may avail themselves of this rule of estoppel, to force the grantee to take the estate, however changed the situation of his own affairs, or the condition of the land. So that the equitable rule of estoppel, which forbids the grantor to deny that he had the estate which he had assumed to grant, and the truth of his own covenant—a rule established for the protection of the grantee, and to be applied only to effect justice and prevent wrong—is converted into a right of election in the grantor, upon a breach of his covenant, to pay back the consideration money, or by indirection to reconvey the estate. We say an election by the grantor; for it is clear that the grantee cannot compel the grantor to buy in the paramount title, but must rely solely upon his covenants. It is equally clear that, if the estate, during the eviction, should greatly increase in value, the grantor would not be likely to purchase such paramount title, but would submit to an action on his covenants. So that, under any rule of damages suggested, the plaintiff would lose many of the advantages resulting from the ownership of land, including the increase of value by the application of his own labor or capital, or its rise in the market. There is neither mutuality nor equity in such a rule.

And we are satisfied, upon examination of the authorities, that no case will be found which carries the doctrine of estoppel to the length claimed by the defendants, which in fact estops the grantee, and leaves a right of election in the grantor. The case of *Baxter v. Bradbury*, 20 Maine, 260, has been strongly pressed upon us as a decision of the very question at issue. If this were so, the question having reference to the title to land in that State, the decision, on that ground, as well from our respect for that court, would be entitled to the highest consideration, if indeed it were not conclusive. But, though there are *dicta* in that case, which state the doctrine very broadly, the case itself differs materially from the one at bar. That was an action for a breach of the covenant of seisin in a deed of warranty, with a mortgage back of the premises, of the same date, to the grantor. The ground, taken by the counsel of the defendant, and upon which the court seem to have proceeded in their judgment, was, that there never had been any interruption of the possession of the plaintiff. In seeking to deduce from that case a rule for our guidance, this circumstance must be deemed most material; as, for a breach of this covenant against encum-

branches, nominal damages only could be recovered, unless the plaintiff had been evicted by title paramount, or had actually discharged the encumbrance.

The court, in the case of *Baxter v. Bradbury*, refer to a statement of the result of the authorities by the late Chief Justice Parker in the case of *Somes v. Skinner*, 3 Pick. 52. An examination of the whole opinion in that case would lead us to infer that this statement was not made without some misgiving and distrust. The precise question now under consideration was not before the court, and what in that part of the case was decided was, that where a title has inured by estoppel, it will avail the grantee, not only against the grantor and his heirs, but strangers, who usurp possession without right; and under the facts of the case, and in the view in which it was applied, there is no occasion to reconsider the rule there stated.

The case of *Cornell v. Jackson*, 8 Cush. 506, was an action upon the covenant of seisin. An action had before been brought upon the covenant of warranty, in which there was a judgment for the defendant. 9 Met. 150. The defendant had conveyed land to the plaintiff, bounded on land of Tuckerman; a conventional line had been fixed by parol agreement between the defendant and Tuckerman; and they had occupied according to that conventional line; but the court, in the action on the covenant of warranty, held that the true line, and not the conventional line, was the boundary referred to in the defendant's deed. An action was then brought on the covenant of seisin; and the possession of land by Tuckerman, between the true line and the conventional line, being under a claim of title, was held to be a breach of the covenant of seisin. In the assessment of damages, it appeared that a portion of the land had been recovered by the defendant of the heirs of Tuckerman; and the report of the assessor submitted the question, whether the value of the land so recovered should be included in his assessment. The court said: "If, by any means, the party is restored to his land before the assessment of damages, though it cannot purge the breach of covenant, it will reduce the damages *pro tanto*." In that case the title was in the grantor at the time of the deed, and he might have made a valid conveyance but for the disseisin; and what the court decided was, that if he subsequently regained the seisin, and the land was restored to the grantee, it would proportionally reduce his damages.

Upon examination of the authorities, we think no decision will be found to be in conflict with the point now decided, or which leads to the result claimed by the defence. There are *dicta* which, taken out from their connection with the facts, in relation to which they are made, and by which their soundness must always be tested, might tend to a different conclusion; but no precedent has so extended the doctrine of estoppel, and we do not feel willing to make one.

The question of course arises, How will the defendants, the grantors, be protected? Will they not be still estopped to deny the title of the plaintiff, if he should bring his writ of entry for the land? The answer

is, that the judgment in this suit will be a perfect bar to the plaintiff and those claiming under him. *Porter v. Hill*, 9 Mass. 84.

With regard to the rule of damages, there can be no serious controversy, if the plaintiff has gained no title by estoppel; the plaintiff will be entitled to the consideration money and interest. The consideration expressed in the deed is *prima facie* the true one, but liable to be controverted by evidence.

The case must be sent to a jury to ascertain the damages under this rule.¹

¹ In *Reaser v. Carney*, 52 Minn. 397 (1893), A., having no title, purported to convey land to B., with covenants of seisin and warranty. B. brought suit on the covenant of seisin. After suit brought A. bought in the title and urged that B. was compelled to accept such title. The land was vacant at the time of A.'s deed and had at all times continued vacant. The court said, page 402:

"Upon the question thus presented, the law cannot be said to be settled. In support, wholly or to some extent, of the proposition that a title acquired by the grantor subsequent to the conveyance by him inures by operation of law to his grantee, even though he is unwilling then to accept it, and hence will mitigate the damages recoverable for breach of covenant, or wholly defeat an action for damages, according to the circumstances of the case, may be cited *Baxter v. Bradbury*, 20 Me. 260; *King v. Gilson's Adm'rs.*, 32 Ill. 348; *Reese v. Smith*, 12 Mo. 344; *Morrison v. Underwood*, 20 N. H. 389; *Knowles v. Kennedy*, 83 Pa. St. 445; *Farmers' Bank v. Glenn*, 68 N. C. 35; *Cornell v. Jackson*, 3 Cush. 506; *Boulter v. Hamilton*, 15 U. C. C. P. 125, citing *Doe* ——— *v. Webster*, 2 U. C. Q. B. 225. See, also, *Knight v. Thayer*, 125 Mass. 25. In some of these cases, however, it may be noticed that the plaintiff was in possession of the granted lands under his deed.

"On the contrary, the doctrine is well supported by authority that a grantee to whom no title passed by the deed of conveyance, who acquired no possession, and no right of possession, may recover the purchase money paid, with interest, in an action for a breach of the covenant of seisin, even though the grantor may have acquired a title during the pendency of such an action, or, perhaps, even prior to its commencement; that the grantee is not to be compelled to accept the after-acquired title in satisfaction of the already-broken covenant of seisin, or in mitigation of damages recoverable for the breach. *Blanchard v. Ellis*, 1 Gray, 195; *Tucker v. Clark*, 2 Sandf. Ch. 96; *Bingham v. Weidewitz*, 1 N. Y. 509; *Nichol v. Alexander*, 28 Wis. 118; *McInnis v. Lyman*, 63 Wis. 191, (22 N. W. Rep. 406); *Burton v. Reeds*, 20 Ind. 87, 98; *Rawle, Cov.* §§ 179-182, 256-258, 264, 265; *Bigelow, Estop.* 440; *Sedg. & W. Tr. Title Land*, § 850. While in some of the cases last cited there had been an eviction of the covenantee after he had been in possession, that would not distinguish such cases from that now before us. The inability of the plaintiffs to enter into possession of this vacant land without committing a trespass, by reason of the paramount title being in another, would have the same effect, as respects the right of action for a breach of the covenants contained in the deed, as would an eviction if possession had been acquired. *Fritz v. Pusey*, 31 Minn. 368, (18 N. W. Rep. 94); *Shattuck v. Lamb*, 65 N. Y. 499.

"To our minds the authorities last cited present the view of the law most consistent with reason and with familiar legal principles, as well as the rule most conducive to justice, in its practical application.

"It is certain, if the defendant's deed conveyed no title, that the plaintiffs had a legal right, when this action was commenced, to recover the purchase price paid for a title. They elected to pursue that remedy, and still insist upon the legal right. We cannot understand how that perfect, absolute legal right of action, and especially after an action has been already instituted, is defeated; how the right, at the election of the grantee, to enforce his action for the breach of the covenant is taken away or lost by any proper application of the principle that an after-acquired title

AYER v. PHILADELPHIA AND BOSTON FACE BRICK COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1893.

[Reported 159 Mass. 84.]

WRIT OF ENTRY to foreclose a mortgage.¹

One Waterman made a first mortgage and later a second mortgage. The first was foreclosed, and the land subsequently was reconveyed to him. Then the holder of the second mortgage conveyed to a third person who conveyed to the demandant. The tenant is a grantee under Waterman. In the granting part of this second mortgage the land is stated to be "conveyed subject" to a certain right of drainage, a certain easement, "and the mortgage hereinafter named." The covenants are as follows: "And I, the said grantor, for myself and my heirs, executors, and administrators, do covenant with the said grantees and their heirs and assigns, that I am lawfully seised in fee simple of the aforegranted premises; that they are free from all encumbrances, except a certain mortgage given by me to the Boston Five Cents Savings

inures to the benefit of the grantee, by force of his covenants, and upon principles embraced within the general doctrine of estoppel. We do not concur in the proposition that the principle just referred to is effectual to actually transfer and vest in the covenantee an estate acquired by the covenantor subsequent to his conveyance. See, in addition to the authorities above cited, *Buckingham v. Hanna*, 2 Ohio St. 561; *Burners v. Keran*, 24 Grat. 42, 67; *Chew v. Barnet*, 11 Serg. & R. 389, 391. Indeed, that the estate is thus actually transferred to the covenantee, without resting in the covenantor, to whom the after-acquired title is in terms conveyed, is inconsistent with the idea of an estoppel binding the latter and those in privity with him; and yet it is not to be doubted that the doctrine which we are considering really rests upon the ground of estoppel. It is founded on equitable principles, and affords to a grantee with covenants a remedy of an equitable nature with respect to a title acquired by the grantor after he had assumed to convey the same; and doubtless courts of law, at this day, recognize and apply the principle of estoppel, in such cases, as courts of equity are wont to do. They will treat the after-acquired title as though it had been conveyed, when equity would decree that a conveyance be made. Rawle, Cov. § 258. But this equitable right is one in favor of the covenantee, resting upon the estoppel of the covenantor to assert, as against him, a title to the property. If the grantee acquires nothing by the deed to him, and has and asserts a legal cause of action for covenant broken, no principle of estoppel operates against him, to compel him, perhaps years afterwards, as in this case, to accept, in satisfaction of that legal cause of action, wholly or partially, a title which his covenantor may then procure. The latter, whose covenant has been wholly broken, has no right to elect, as against the covenantee, and to his prejudice, whether he will respond in damages for the breach by repaying the purchase money, or buy in the paramount title, when the value of the property may have greatly depreciated, and compel the plaintiff to accept that title. The right of election is, and should be, with the other party. He has the benefit of the estoppel, but it is not to be imposed upon him as a burden, at the will of the party who alone is subject to the estoppel. He may elect to pursue the action at law, and recover the consideration paid for a title which was not conveyed to him. At least, he may so elect, as the plaintiffs did in this case, at any time before the acquisition of the title by the covenantor."

¹ The statement of facts is taken from the opinion of *Holmes, J.*, in the same case when before the court for the first time as reported in 157 Mass. 57. The court then held, that the covenant of warranty made by Waterman in his second mortgage covered the existing first mortgage.

Bank, dated March 1, 1872, to secure the sum of forty thousand dollars, the right of drainage and the easement aforesaid; that I have good right to sell and convey the same to the said grantees, and their heirs and assigns forever, as aforesaid; and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the said grantees and their heirs and assigns for ever, against the lawful claims and demands of all persons, except the right of drainage and the easement aforesaid."

H. G. Parker and *J. C. Gray*, (*E. L. Rand* with them,) for the tenant.

W. G. Russell and *F. W. Kittredge*, for the demandant.

HOLMES, J. When this case was before us the first time, 157 Mass. 57, it was assumed by the tenant that the only question was whether the covenant of warranty in the second mortgage should be construed as warranting against the first mortgage. No attempt was made to deny that, if it was so construed, the title afterwards acquired by the mortgagor would enure to the benefit of the second mortgagee under the established American doctrine. The tenant now desires to reopen the agreed facts for the purpose of showing that after a breach of the covenant in the second mortgage, and before he repurchased the land, the mortgagor went into bankruptcy and got his discharge. The judge below ruled that the discharge was immaterial, and for that reason alone declined to reopen the agreed statement, and the case comes before us upon an exception to that ruling.

The tenant's counsel frankly avow their own opinion that the discharge in bankruptcy makes no difference. But they say that the inuring of an after acquired title by virtue of a covenant of warranty must be due either to a representation or to a promise contained in the covenant, and that if it is due to the former, which they deem the correct doctrine, then they are entitled to judgment on the agreed statement of facts as it stands, on the ground that there can be no estoppel by an instrument when the truth appears on the face of it, and that in this case the deed showed that the grantor was conveying land subject to a mortgage. If, however, contrary to their opinion, the title inures by reason of the promise in the covenant, or to prevent circuitry of action, then they say the provision is discharged by the discharge in bankruptcy.

However anomalous what we have called the American doctrine may be, as argued by Mr. Rawle and others (*Rawle on Covenants*, 5th ed., §§ 247 *et seq.*), it is settled in this State as well as elsewhere. It is settled also that a discharge in bankruptcy has no effect on this operation of the covenant of warranty in an ordinary deed where the warranty is coextensive with the grant. *Bush v. Cooper*, 18 How. 82; *Russ v. Alpaugh*, 118 Mass. 369, 376; *Gibbs v. Thayer*, 6 Cush. 30; *Cole v. Raymond*, 9 Gray, 217; *Rawle on Covenants*, (5th ed.) § 251. It would be to introduce further technicality into an artificial doctrine if a different rule should be applied where the conveyance is of land subject to a mortgage against which the grantor covenants to war-

rant and defend. No reason has been offered for such a distinction, nor do we perceive any.

But it is said that the operation of the covenant must be rested on some general principle, and cannot be left to stand simply as an unjustified peculiarity of a particular transaction without analogies elsewhere in the law, and that this general principle can be found only in the doctrine of estoppel by representation, if it is held, as the cases cited and many others show, that the estoppel does not depend on personal liability for damages. Rawle on Covenants, (5th ed.) § 251.

If the American rule is an anomaly, it gains no strength by being referred to a principle which does not justify it in fact and by sound reasoning. The title may be said to enure by way of estoppel when explaining the reason why a discharge in bankruptcy does not affect this operation of the warranty; but if so, the existence of the estoppel does not rest on the prevention of fraud or on the fact of a representation actually believed to be true. It is a technical effect of a technical representation, the extent of which is determined by the scope of the words devoted to making it. A subsequent title would inure to the grantee when the grant was of an unencumbered fee although the parties agreed by parol that there was a mortgage outstanding; (*Chamberlain v. Meeder*, 16 N. H. 381, 384; see *Jenkins v. Collard*, 145 U. S. 546, 560;) and this shows that the estoppel is determined by the scope of the conventional assertion, not by any question of fraud or of actual belief. But the scope of the conventional assertion is determined by the scope of the warranty which contains it. Usually the warranty is of what is granted, and therefore the scope of it is determined by the scope of the description. But this is not necessarily so; and when the warranty says that the grantor is to be taken as assuring you that he owns and will defend you in the unencumbered fee, it does not matter that by the same deed he avows the assertion not to be the fact. The warranty is intended to fix the extent of responsibility assumed, and by that the grantor makes himself answerable for the fact being true. In short, if a man by a deed says, I hereby estop myself to deny a fact, it does not matter that he recites as a preliminary that the fact is not true. The difference between a warranty and an ordinary statement in a deed is, that the operation and effect of the latter depends on the whole context of the deed, whereas the warranty is put in for the express purpose of estopping the grantor to the extent of its words. The reason "why the estoppel should operate, is, that such was the obvious intention of the parties." *Blake v. Tucker*, 12 Vt. 39, 45.

If a general covenant of warranty following a conveyance of only the grantor's right, title, and interest were made in such a form that it was construed as more extensive than the conveyance, there would be an estoppel coextensive with the covenant. See *Blanchard v. Brooks*, 12 Pick. 47, 66, 67; Bigelow, Estoppel, (5th ed.) 403. So in the case of a deed by an heir presumptive of his expectancy with a covenant of warranty. In this case, of course, there is no pretence that the grantor has a title coextensive with his warranty. *Trull v. Eastman*, 3 Met.

121, 124. In *Lincoln v. Emerson*, 108 Mass. 87, a first mortgage was mentioned in the covenant against encumbrances in a second mortgage, but was not excepted from the covenant of warranty. The title of the mortgagor under a foreclosure of the first mortgage was held to inure to an assignee of the second mortgage. Here the deed disclosed the truth, and for the purposes of the tenant's argument it cannot matter what part of the deed discloses the truth, unless it should be suggested that a covenant of warranty cannot be made more extensive than the grant, which was held not to be the law in our former decision. See also *Calvert v. Sebright*, 15 Beav. 156, 160.

The question remains whether the tenant stands better as a purchaser without actual notice, assuming that he had not actual notice of the second mortgage.

"It has been the settled law of this Commonwealth for nearly forty years, that, under a deed with covenants of warranty from one capable of executing it, a title afterwards acquired by the grantor inures by way of estoppel to the grantee, not only as against the grantor, but also as against one holding by descent or grant from him after acquiring the new title. *Somes v. Skinner*, 3 Pick. 52; *White v. Patten*, 24 Pick. 324; *Russ v. Alpaugh*, 118 Mass. 369, 376. We are aware that this rule, especially as applied to subsequent grantees, while followed in some States, has been criticised in others. See Rawle on Covenants, (4th ed.) 427 *et seq.* But it has been too long established and acted on in Massachusetts to be changed, except by legislation." *Knight v. Thayer*, 125 Mass. 25, 27. See *Powers v. Patten*, 71 Maine, 583, 587, 589; *McCusker v. McEvey*, 9 R. I. 528; *Tefft v. Munson*, 57 N. Y. 97.¹

It is urged for the tenant that this rule should not be extended. But if it is a bad rule, that is no reason for making a bad exception to it. As the title would have inured as against a subsequent purchaser from the mortgagor had his deed made no mention of the mortgage, and as by our decision his covenant of warranty operates by way of estoppel notwithstanding the mention of the mortgage, no intelligible reason can be stated why the estoppel should bind a purchaser without actual notice in the former case, and not bind him in the latter.

Upon the whole case, we are of opinion that the demandant is entitled to judgment. Our conclusion is in accord with the decision in a very similar case in Minnesota. *Sandwich Manuf. Co. v. Zellmer*, 48 Minn. 408. *Exceptions overruled.*²

¹ In *Philly v. Sanders*, 11 Ohio St. 490, 496 (1860), the court said: "The force and effect of the estoppel is, in law, just as binding upon a subsequent grantee as it is upon the grantor; and upon either it is equally obligatory with the language of the deed creating the first grant, or conveyance. An obligation of estoppel binds not only the grantor in such a case, but his heirs and subsequent grantees, and all persons privy to him. It adheres to the land, and is transmitted with the estate, whether the same passes by descent or purchase. And the estoppel becomes, and forever after remains, a muniment of the title so acquired; and when the party so estopped conveys the land, he necessarily conveys it subject to such estoppel in the hands of his grantee." See also *Doe d. Potts v. Dowdall*, 3 Houst. 869 (Del. 1866).

² See *Rooney v. Koenig*, 80 Minn. 483 (1900); *Dye v. Thompson*, 126 Mich. 597 (1901).

PERKINS v. COLEMAN.

COURT OF APPEALS OF KENTUCKY. 1890.

[Reported 90 Ky. 611.]

JUDGE BENNETT delivered the opinion of the court.

N. G. Terry owned an undivided interest in the land in controversy, and conveyed the whole of it to Horace Dunham by deed of general warranty. Thereafter Terry inherited that part of the land that he did not own, and this action of ejectment is brought by Terry's heirs to recover the possession of that part of the land thus inherited from the appellee. He resists the right of the appellants to recover the said land upon the ground that the title that Terry inherited was transferred to his vendee by estoppel. The appellants contend that the doctrine of estoppel does not protect strangers to the transaction; but only the parties and privies are bound thereby; and as the appellee is neither party nor privy, he cannot avail himself of the estoppel that would bar the appellants' right as against Dunham or his privies.

It is true that where the estoppel merely affects the consciences of the parties, and not the title, it does not operate on strangers to the transaction; but where it "works an interest in the land" conveyed, "it runs with it, and is a title." Where it clearly appears from the writing that the vendor has conveyed, or agrees to convey, a good and sufficient title, and not merely his present interest in the land, the agreement runs with the land, and repeats itself every day; and if the vendor, at the time of the conveyance, has not title to the land, but subsequently acquires the title, it, "*eo instante*," inures to the benefit of the vendee and his privies. In other words, it is immediately transferred by the law of estoppel to the vendee and his privies, because by the contract, which daily repeats itself, the vendor's title, whenever acquired, is transferred to the vendee and his privies; consequently, a stranger to the transaction, in an action of ejectment by the vendor against him, where he must recover upon the strength of his title, and not upon the weakness of his adversary, may show that he has thus parted with his title. *The judgment is affirmed.*¹

¹ In *Somes v. Skinner*, 3 Pick. 51 (Mass. 1825), A owned a parcel of land. His son B purported to mortgage this to X by deed with covenant of warranty. A died and the land came by descent to B and C his brother. C was in possession. X brought a writ of entry, and it was held, that he was entitled to recover a moiety of the land. The court said that the after-acquired title passed to the grantee as against the grantor, and those claiming under the grantor, "and against mere strangers who usurped the possession without right or title."

CHAPTER IX.

EXECUTION OF DEEDS.

CONVEYANCE BY THE OWNER OF LANDS WHICH ARE IN THE ADVERSE POSSESSION OF ANOTHER. The Statute of 32 Hen. VIII. c. 9 (1540) enacted that no person should buy or obtain "any pretended rights or titles" to any lands, tenements or hereditaments, upon pain that the buyer and seller should each forfeit the value. This Statute not only imposes a penalty but avoids the conveyance. *Doe d. Williams v. Evans*, 1 C. B. 717 (1845). It is said to have been in affirmance of the common law. *Ib.* See *Hathorne v. Haines*, 1 Greenl. 238, 247 (Me. 1821).

In many States by statute this rule has now been abolished and the conveyance by the owner is good even against the person in possession. See *Stimson*, Am. St. Law, § 1401; *Mass. Rev. Laws*, c. 127, § 6. And in some States, the same result has been reached without the aid of statutes. *Cresson v. Miller*, 2 Watts, 272 (Pa. 1834); *Hall v. Ashby*, 9 Ohio, 96 (1839); *Poyas v. Wilkins*, 12 Rich. 420 (So. Car. 1830); *Bentinck v. Franklin*, 38 Tex. 458 (1873).

As there is no cession of easements the rule against champertous conveyances has no application to them. See *Randall v. Chase*, 133 Mass. 210, 214 (1882); *Corning v. Troy Iron Factory*, 40 N. Y. 191, 204 (1869). And it has been held not to apply to a conveyance to a purchaser at a sale on execution or otherwise by order of court. See *McGill v. Doe d. McCall*, 9 Ind. 306 (1857). It was further held, in *Webb v. Thompson*, 23 Ind. 428 (1864), that the deed by a purchaser at an execution sale was good, although the land continued in the adverse possession of the judgment debtor. But the contrary was held in *Bernstein v. Humes*, 60 Ala. 582 (1877). See also *Violet v. Violet*, 2 Dana, 323 (Ky. 1834).

If the owner peaceably enters upon the land and there delivers a deed thereof, it has been held that his title passes. *Warner v. Bull*, 13 Met. 1 (Mass. 1847). And the deed of the owner is usually held to be good against all the world except the person in possession and those claiming under him. *Middleton v. Arnolds*, 13 Grat. 489 (Va. 1856); *McMahan v. Bowe*, 114 Mass. 140 (1873). But see *Brinley v. Whiting*, 5 Pick. 347 (Mass. 1827); *Altamus v. Nickell*, 115 Ky. 506 (1908).

If the grantee enters peacefully upon the land he has been allowed to use his title to defend himself against a writ of entry. *Cleveland v. Flagg*, 4 Cush. 76 (Mass. 1849).

And when the grantee had sued in the name of his grantor, and recovered judgment, it was held, that the grantor could not release to the person in possession. *Edwards v. Parkhurst*, 21 Vt. 472 (1849). But a deed from the grantee to the person in possession was held to release the right of the grantor. *Farnum v. Peterson*, 111 Mass. 148 (1872). Where the owner gave a deed of the land to a third person, and thereafter gave a deed to the person in possession who had knowledge of the prior deed, it was held, that the owner could not then sustain an action for the benefit of his first grantee to eject the person in possession. *Dever v. Hagerty*, 169 N. Y. 481 (1902).

After judgment in an action against the person in possession, brought by the grantee of the owner in the name of his grantor, the person previously in possession cannot bring trespass against the grantee for acts done before the rendering of the judgment. *Edwards v. Roys*, 18 Vt. 473 (1846). See *Hathorne v. Haines*, 1 Greenl. 238 (Me. 1821).

That there may be a possession which is not adverse so as to make a deed champertous and which yet may be adverse so as to raise the bar of the Statute of Limitations, is said in *Crary v. Goodman*, 22 N. Y. 170 (1860). And see *Brown v. Gay*, 3 Greenl. 126, 130 (Me. 1824) and other cases cited in the note on p. 59 ante.

SECTION I.

SIGNING AND SEALING.

NOTE. — "The first question is, whether it is necessary by the Statute of Frauds that a lease under seal should also be *signed*. The words of the first section are, 'all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages,' &c., 'made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only.'

"The plea in this case is framed in the very words of the plea in the case of *Cardwell v. Lucas*, 2 M. & W. 111, in which it does not seem to have occurred to the court or the counsel that the words 'signed by the parties,' &c., might apply only to instruments not under seal. It is now argued, that inasmuch as the previous words are 'made or created by livery and seisin only, or by parol,' the distinction apparently intended to be established by the Statute of Frauds was between estates or interests created by a formal instrument, and those created by mere matter *in pais*, which must be established by the fallible recollection of witnesses. Mr. Justice Blackstone, in his Commentaries, vol. ii. p. 306, lays it down that the Statute of Frauds has restored the old Saxon form of *signing*, and superadded it to sealing and delivery in a case of a deed. Mr. Preston, on the other hand, in his edition of Sheppard's Touchstone, p. 56, note 24, treats this passage in Blackstone as a mistake from not attending to the words of the Statute, and holds it clear that no signature is necessary in the case of a deed. It is curious that the question should now for the first time have arisen in a court of law, and perhaps as curious that it is not necessary now to determine it; for although the plea negatives signature only, and not sealing or delivery, by the plaintiffs and the deceased, yet it appears by the indenture, as set out on oyer, and thereby become part of the declaration, that it was not sealed by the plaintiffs." — *PER LORD DENMAN, C. J.*, in *Cooch v. Goodman*, 2 Q. B. 580, 596-598 (1842).

"PARKE, B. . . . It is unnecessary to give an opinion on the other points; but I must own that I think a deed is not within the Statute of Frauds, because, in my opinion, that Statute was never meant to apply to the most solemn instrument which the law recognizes. I also think that the notice which refers to the deed would, if it were necessary to have recourse to it, be a sufficient note or memorandum within the Statute. I do not mean to be concluded by this expression of my opinion on the two latter points, but only to state my present impression.

"ALDERSON, B. I also think that *Donellan v. Read* [3 B. & Ad. 899] is good law; but even if it were not, this case would not require its assistance, because, this being the case of a deed, it must be taken to have been sealed by the parties in due form, and the Statute does not apply to such instruments, but only to parol agreements.

"ROLFE, B. I am strongly inclined to think that the Statute does not extend to deeds, because its requirements would be satisfied by the parties putting their mark to the writing. The object of the Statute was to prevent matters of importance from resting on the frail testimony of memory alone. Before the Norman time, signature rendered the instrument authentic. Sealing was introduced because the people in general could not write. Then there arose a distinction between what was sealed and what was not sealed, and that went on until society became more advanced, when the Statute ultimately said that certain instruments must be authenticated by signature. That means, that such instruments are not to rest on parol testimony only, and it was not intended to touch those which were already authenticated by a ceremony of a higher nature than a signature or a mark.

"PLATT, B., concurred." — *Cherry v. Heming*, 4 Ex. 631, 636 (1849).

LORD SAY AND SEAL'S CASE.

QUEEN'S BENCH. 1711.

[Reported 10 Mod. 40.]

UPON a trial at bar in the Court of Queen's Bench, in an ejectment brought by the heirs at law against the Lord Say and Seal, who claimed as heir in tail;

The single question was, Whether or no a *common recovery* that was suffered in order to dock the entail, was good or not?

The objection to the recovery was, that there was no tenant to the *præcipe*.

To prove the recovery good, a deed bearing date the twenty-third of October, 1701, directing the uses of the recovery, and the fine, viz. the chirograph of the fine, and common recovery, were produced.

[The court held that the fine had created a good tenant to the *præcipe*. This part of the case is omitted.]

After this, there was a deed of *bargain and sale* enrolled produced, which would have made a good tenant to the *præcipe* had the opinion of the court been against the plaintiffs, as it was for them.

But to this deed this objection was made, that it was a tripartite deed, and ran to this effect: "This indenture, made the day of

 , between of the one part, and

 of the second part, and of the third part,

witnesseth, That for and in consideration of the sum of five shillings, to him in hand paid, hath given and granted, &c." Now here they said the person granting is wanting, "hath granted," without saying who hath granted, and consequently this deed passes nothing, and can therefore make no tenant to the *præcipe*.

The court was of opinion, that the deed was good. Had this been a tripartite deed, without this slip, there had been no doubt at all in the case; but the deed is tripartite, and "hath" in the singular number, and therefore all the doubt is to whom the "hath" refers. Deeds are to be interpreted, as much as possible, according to the intention of the parties. The case of *Haslewood v. Mansfield*, 2 Vent. 196, was a case upon pleading, where greater strictness is required, and therefore does not come up to the case in point. The case of *Trethewy v. Ellesdon*, 2 Vent. 141, does. Many are the instances where the penalties of bonds are put into very strange and even false Latin, and yet held good. See 1 Salk. 462; 3 Salk. 74. The case in question is the case of a bargain and sale, and therefore to be interpreted more favorably than a deed. By the common law, nothing passed by deed of bargain and sale but the use, and the remedy was only in chancery; but now Statute-law has passed the estate to the use. The intention of the deed is plain, if this deed do not make Lord Say grantor, as to

him it would have no effect at all, who yet sealed it. According to the common rules of indenture, the words of the deed are the words of all the parties, but Lord Say is a party, therefore he has granted.

The truth of the matter was, that it being feared this slip in the deed would be fatal to the recovery, this other contrivance of the fine was judged to be the best way of supporting it.

Though the opinion of the court was clear and plain for the plaintiffs in both points, yet the Lord Say and Seal prayed a bill of exceptions.¹

CATLIN v. WARE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1812.

[Reported 9 Mass. 218.*]

THIS was a writ of *dower*, to which the tenant pleaded in bar: — 1st That the demandant's husband Joseph Catlin was never seised, &c. on which issue was joined. 2d That the said Joseph, being seised in his demesne as of fee, on the 28th day of March, 1793, by his deed of that date duly acknowledged, &c., for a valuable consideration, bargained and sold the same land, in which the demandant claims her dower, to one David Horton in fee simple; and that the said Abigail, by the consent of her husband, for the consideration in the said deed expressed, and also of one dollar paid her by the said David, assented and agreed to the same deed of the said Joseph, and then and there by her act and consent, signified by her affixing her seal to the said deed, and subscribing her mark thereto, she being unable to write her name, barred herself of all right of dower in the same premises and every part thereof; by virtue whereof the said David became seised in fee of the same premises, free and exempt from all claim demand or right of dower of the said Abigail therein.

The demandant replied, that she did not by her act and consent signified, &c., bar herself, &c., and tendered an issue to the country, which was joined by the tenant.

The several issues thus joined were tried at the last April Term of this court in this county, before *Sedgwick*, J., from whose report it appears, that the seisin of the demandant's husband and her coverture were agreed, as alleged in the writ.

The tenant produced the deed of Joseph Catlin to David Horton, mentioned in the pleadings. It purported a conveyance in fee of the land, in which dower is demanded, and to it, after the name and seal of her husband, were set the demandant's seal and mark. But her name was not otherwise mentioned in the deed, nor were there any words therein purporting or implying a release of her right of dower. The deed was acknowledged by the husband, and recorded; but there was no acknowledgment by the wife.

¹ See *Dart v. Clayton*, 4 New R. 221 (1864).

² Part of the case is omitted.

On the part of the tenant it was insisted at the trial, that the latter issue was proved on his behalf. But the judge directed a verdict on both issues in favor of the demandant; referring to the decision of the court, the question whether that direction was right.

Bliss, for the tenant.

Ashmun, for the demandant.

CURIA. Two objections, made to the deed read in evidence at the trial of this cause, have been replied to by the counsel for the tenant.

As to the second, the want of an acknowledgment by the wife, we think an acknowledgment unnecessary in the case. One party to a deed acknowledging it gives notoriety to it, and that is the whole that is necessary. Though a deed be acknowledged and recorded, yet on the issue of *non est factum* the execution of the deed is still to be proved, as if it had not been acknowledged. *Inhabitants of Worcester v. Eaton*, 11 Mass. R. 379; 18 Mass. Rep. 371. Neither was an acknowledgment by the wife necessary in order to make the deed binding on her. She must know her own acts, and is bound by such, as the law authorizes her to execute.

The other objection to this deed has much more weight in it, and is indeed fatal to the defence of the action. A deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound. In this case, whatever may be conceived of the intention of the demandant in signing and sealing the deed, there are no words implying her intention to release her claim of dower in the lands conveyed which must have been, to give it that operation. It was merely the deed of the husband, and the wife is not by it barred of her right to dower.¹

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AGRICULTURAL BANK OF MISSISSIPPI v. RICE.

SUPREME COURT OF THE UNITED STATES. 1846.

[*Reported 4 How. 225.*]

ERROR to the Circuit Court of the United States for the Southern District of Mississippi. The opinion of the court presents the necessary facts and the questions decided.

Mason (Attorney-General), for the plaintiff.

Johnson and Crittenden, contra.

TANEY, C. J., delivered the opinion of the court.

This being an action of ejectment, the only question between the parties is upon the legal title.

It is admitted in the exception, that Mary Rice and Martha Phipps, lessors of the plaintiff, were each of them, as heirs at law of Adam

¹ *Contra*, reluctantly, on the ground of established custom in New Hampshire. *Burge v. Smith*, 27 N. H. 382 (1853); and see *Woodward v. Seaver*, 38 N. H. 29 (1859).

² This case is printed from Mr. Justice Curtis's edition of the Reports of Decisions in the Supreme Court of the United States.

Bower, entitled to an undivided third part of the premises mentioned in the declaration, in fee-simple. In order to show title out of them, the plaintiffs in error relied upon the bond of conveyance and deed, mentioned in the statement of the case, both of which were signed and sealed by these lessors of the plaintiff, but were executed while they were *femes covert*.

As regards the bond, it would not have transferred the legal title, even if all the parties had been capable of entering into a valid and binding agreement. But as to the *femes covert* who signed it, it was merely void, and conferred no right, legal or equitable, upon the obligees.

The deed, also, is inoperative as to their title to the land. In the premises of this instrument, it is stated to be the indenture of their respective husbands in right of their wives, of the one part, and of the grantees, of the other part, — the husbands and the grantees being specifically named; and the parties of the first part there grant and convey to the parties of the second part. The lessors of the plaintiff are not described as grantors; and they use no words to convey their interest. It is altogether the act of the husbands, and they alone convey. Now, in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument, in which another person is grantor, is not sufficient. The deed in question conveyed the marital interest of the husbands in these lands, but nothing more.

It is unnecessary to inquire whether the acknowledgment of the *femes covert* is or is not in conformity with the Statute of Mississippi. For, assuming it to be entirely regular, it would not give effect to the conveyance of their interests made by the husbands alone. And as to the receipt of the money mentioned in the testimony, after they became sole, it certainly could not operate as a legal conveyance, passing the estate to the grantee, nor give effect to a deed which as to them was utterly void.

The judgment of the Circuit Court is therefore affirmed.¹

¹ So accordingly, *Peabody v. Hewitt*, 53 Me. 33, 49, 50 (1861); *Adams v. Medsker*, 25 W. Va. 127 (1884); *Fiss Porter & Co. v. Kennamer*, 90 Ala. 470 (1889); and *cf. Flagg v. Bean*, 25 N. H. 49, 62, 63 (1852), doubting *Elliot v. Sleeper*, 2 N. H. 525 (1828).

A deed purporting to be a conveyance of land by Edward Jones, and acknowledged by him to be his deed, passes his interest in the land, although the signature thereto reads "Edmund Jones." So said by the Supreme Court of California in *Middleton v. Findla*, 25 Cal. 76 (1864).

But in *Boothroyd v. Eagles*, 23 Mich. 19 (1871), the plaintiff in ejectment, to prove the transfer of the title to the *locus* from Hiram Sherman, a former holder, to one Rawles, under whom the plaintiff claimed, offered in evidence an office copy of a deed which purported to be a conveyance of the land from Hiram Sherman to said Rawles, and which Hiram Sherman had acknowledged to be his deed, but the signature to which read "Harmon Sherman." The court rejected the deed, and the plaintiff alleged exceptions, which were overruled by the Supreme Court of Michigan, the court holding that the deed was not admissible, at least until some "foundation had been laid to connect the two variant names."

NOTE ON SEALS. — Most of the cases on seals have arisen on deeds for other purposes than the conveyance of land. But the principles are the same. See an article on Seals, 1 Am. Law Rev. 638.

In *Everwike v. Luttrell*, 8 Hen. IV. 8 (1406), "*Tyrchitt*, I put it to the court, that although twenty be named in a deed, if it be sealed by one seal, the deed is good. And the court does not say the contrary." See Fitz. Ab. Feoffments, 105.

"And the *Case of Beaumorris* was cited (but I remember not to what purpose). The Mayor and Commonalty of Beaumorris were patrons of a chantry; and they and the chantry priest made a lease for years by indenture, in the end of which was this clause: *In cujus rei testimonium, tam* the priest, *quam* the Mayor and Commonalty have put their common seal, and it was moved that there was not any seal for the priest, for he could not have a common seal with the Mayor and Commonalty. CLARKE [B.]. Twenty men may seal with one seal, and they may also seal with one seal upon one piece of wax only, and that shall serve for them all, if they all lay their hands upon the seal together. MANWOOD [C. B.]. They may all seal with one seal, but upon several pieces of wax. GENT [B.]. When many are parties to a deed, the words are *sigilla omnia*, which cannot be aptly said in this case, where all seal upon one piece of wax." — *Lightfoot and Butler's Case*, 2 Leon. 21 (1587).

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BALL v. DUNSTERVILLE, King's Bench, 1791 (4 T. R. 313). — This was an action on a bill of sale; and the declaration stated that by a certain bill of sale made by the defendants, sealed with the seal of one of them for and on behalf of himself and the other, and by the authority of the other, &c. Plea, *Non est factum*. At the trial at the last Exeter Assizes before *Perry*, B., it was proved that one of the defendants, in the presence of the other and by his authority, executed the instrument for them both, they being partners in this transaction; but there was but one seal, and it did not appear that he had put the seal twice upon the wax. It was objected on the part of the defendants that the instrument was not properly executed, for that they (not being a corporation) could not have a common seal; that the execution by one could not operate as an execution by both, even though they both consented; and that the authority given by one to the other to execute a deed should itself have been conferred by deed. The learned judge overruled the objection, and the plaintiff obtained a verdict; to set aside which a rule was obtained in the last term.

Beacroft and *Lawrence*, Serjt., now showed cause; and relied upon *Lord Lovelace's Case*, Sir W. Jones, 268, where it was said [by *Noy*, A.-G.] that "if one of the officers of the forest put one seal to the rolls by assent of all the verderers, and other officers, it is as good as if every one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all." And they observed that this was a stronger case, because this instrument was executed by one defendant in the presence of the other. But even if it were necessary that the one who did execute should have affixed the seal twice to the wax in order to execute for himself and his partner, it did not appear negatively that it was not done in this case.

Bower, *Rooke*, Serjt., and *Gibbs*, *contra*, said, that though the defendant, who executed the deed, might have executed for himself and his partner, by putting the seal on the same wax, yet that he should actually have executed it twice, first for the one and then for the other; whereas here, he had only executed and delivered it once, which could not be taken to be the execution of both. But

The COURT were clearly of opinion that there was no ground for the objection; that no particular mode of delivery was necessary, for that it was sufficient if the party, executing a deed, treated it as his own. And they relied principally on this deed having been executed by one defendant for himself and the other in the presence of that other.

Rule discharged.

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"In *Sprange v. Barnard*, 2 Bro. C. C. 585, a *feme covert* had a power of appointment over personalty by will, to which by the words of the power a seal was required.¹ She first wrote her will on unstamped paper, and then thinking it to be material that her will should be upon stamps, she wrote it on stamped paper, and afterwards fixed the two papers together with a wafer, and had it witnessed according to the power. And Lord Kenyon [? Sir Richard Pepper Arden. See 1 Am. Law Rev. 640, note], then Master of the Rolls, held the stamp to be equivalent to a seal, without having, he said, recourse to the wafer, which annexed the stamped paper to the former. The Statute of 1 Vict. c. 26, however, renders a seal no longer necessary, although expressly required, but substitutes for the solemnities annexed to the execution of the power a signature and two witnesses (§ 10). Upon the question decided in *Sprange v. Barnard*, independently of the Statute, it may be doubted whether either the stamp or the wafer could consistently be deemed a seal within the meaning of the power. The stamp is a mere regulation of the revenue to prevent fraud; and it has been very properly determined that the revenue laws ought never to be held to operate beyond their direct and immediate purpose, to affect the property, and vary the rights of parties, not within the intention of the Act. *Duckmaster v. Harrop*, 7 Ves. 345. The wafer was merely to keep the two papers together. Neither the stamp nor the wafer was affixed with an intention to seal the will. Sealing is essential to a deed; and it is quite clear that neither the stamps on the parchment nor the annexation of the deed by means of a wafer to another deed, would be equivalent to sealing. And when sealing is required to an instrument executing a power, it must be understood to mean such a sealing as is required, where a seal is by law essential. This is clearly proved by the cases before mentioned as to the execution of wills. But sealing is a solemnity which by this decision may be completely evaded. The principle applies equally to a deed executing a power as to a will. Now the common law will not inquire into the consideration of a deed, because of the solemnity and deliberation with which it is perfected. For, first, there is the determination of the mind to do it, and upon that the party causes it to be written, which is one part of the deliberation; and afterwards he puts his seal to it, which is another part of deliberation; and lastly, he delivers the writing as his deed, which is the consummation of his resolution. Plowd. 308. This shows the importance which the common law attaches to the ceremony of sealing. But it is not necessary that an impression should be made with wax or with a wafer. If the seal, stick, or other instrument used, be impressed by the party on the plain parchment or paper, with an intent to seal it, it is clearly sufficient; and therefore where the instrument is a deed, and on proper stamps, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper. This, I am told, Lord Eldon decided when in the Common Pleas. But in *Sprange and Barnard*, Lord Kenyon rested his decision on the single circumstance of the instrument being upon stamps."—*Sugden, Powers* (8th ed.), 231.

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In *The Queen v. St. Paul, Covent Garden*, Queen's Bench, 1845 (7 Q. B. 232), it was made a question, in the Court of Quarter Sessions, whether an order was under the seal of two justices. "On inspecting the said order, it appeared to the court not to be under the seals of the said justices; and the respondents were called upon to show when and how certain impressions in ink which were to be observed near the respective signatures of the said justices were placed on the said order. The attorney for the respondents was thereupon called as a witness; and on his evidence it appeared to the

¹ "This is according to Mr. Brown's report, and he could scarcely have inserted the words by mistake; but as the case stands in Lib. Reg. it was a power by any writing under her hand and seal, attested, &c., 'or by her will in writing, or any writing purporting to be her will.' No solemnities appear to have been required to the execution of the power by will. And if this were so, the question must have been, whether the ceremonies prescribed in the clause, applied to a will as well as to a writing *inter vivos*; and if they did not, which appears to be the true construction, a seal was not necessary. Reg. Lib. B. 1788, fo. 864."

court that the form of order used in this case was a printed form ; that the pariah officers of St. Martin in the Fields employ a printer to print from time to time a large number of such forms ; that on each sheet of such large number of forms a stationer is employed to impress two marks in ink, which are so impressed by means of wooden blocks ; and that such impressions, when so made at the foot of blank printed forms of orders of removal, are intended to serve as seals for the justices who may sign such orders. Each impression in this instance was so made, before the sheets of paper had been sent to the pariah officers of St. Martin in the Fields by the printer and stationer, and they were in the same state on the order when it was made as they were in when it was produced at the sessions. The impressions represent an equestrian figure of St. Martin sharing his cloak with a beggar, and are of the size of an ordinary seal. The court, after hearing the evidence on which these facts appeared, held that the impression in ink made by such blocks was a sufficient seal to make the order, when signed and delivered by the justices, a good and valid order." In the Court of Queen's Bench, on appeal, upon *Pashley* arguing, that there was no legal seal on the order, DENMAN, C. J., said : " We do not wish to encourage the slightest doubt on this last point " (page 239).

In *Clement v. Donaldson*, 9 U. C. Q. B. 299 (1851), after the defendant signed the instrument in question, the attorney who prepared it took a poker and with the end marked the instrument, saying that would do for a seal. The defendant was present, and made no objection. The court held, that the instrument was not sealed, saying (p. 300):

" So long as the law recognizes so many and such important distinctions between writings sealed and those not sealed, we cannot agree to anything so absurd as to admit that what was done in this case was equivalent to sealing.

" The passage from Sugden on Powers, read by the court in the case of the *Queen v. the Inhabitants of St. Paul, Covent Garden*, is not easily to be reconciled with what is stated in all books of authority on the subject ; and I am not willing to go so far as to hold, that if a person signs his name to a piece of paper, and then merely touches it with a stick (or with the end of his penknife) and says that he seals it, that it shall be taken to be sealed, though the paper bears no mark whatever of an impression either upon wax or on a wafer, or on any substance of any kind, and though nothing has been stamped or in any way impressed upon the paper. At least, I would desire better warrant for so holding than Mr. Sugden's dictum that he was told Lord Eldon so decided when in the Common Pleas."

15 IN RE SANDILANDS, Common Pleas, 1871 (L. R. 6 C. P. 411). — A special commission was issued for taking the acknowledgment of a deed at Melbourne, by Sarah Jane, the wife of Benoni Nimmo Sandilands ; Mary Elizabeth, the wife of Robert John Amies ; Anne Brierly, the wife of Sidney Smith ; and Fanny, the wife of Albert Vines, devisees under the will of John Mayer, deceased. The deed when sent out had pieces of green ribbon attached to the places where the seals should be, but no wax ; and, when returned executed by the several parties, it was in the same condition.

The attestation was in the usual form, " Signed, sealed, and delivered " by the within-named parties ; one of the attesting witnesses being the Mayor of Melbourne, whose official seal was affixed thereto. The certificate of two of the commissioners also stated that the married women appeared personally before them and produced the indenture before them, " and acknowledged the same to be their respective acts and deeds." In all other respects the documents were complete.

R. G. Williams moved that the indenture, special commission, certificate of acknowledgment, notarial certificate, and declaration, be received and filed among the records of this court by the proper officer for that purpose, pursuant to 3 & 4 Wm. 4, c. 74.

BOVILL, C. J. I think there is *prima facie* evidence that this deed was sealed at the time of its execution and acknowledgment by the parties. To constitute a sealing,

neither wax, nor wafer, nor a piece of paper, nor even an impression, is necessary. Here is something attached to this deed which may have been intended for a seal, but which from its nature is incapable of retaining an impression. Coupled with the attestation and the certificate, I think we are justified in granting the application that the deed and other documents may be received and filed by the proper officer, pursuant to the Statute.

BYLES, J. I am of the same opinion. The sealing of a deed need not be by means of a seal; it may be done with the end of a ruler, or anything else. Nor is it necessary that wax should be used. The attestation clause says that the deed was signed, sealed, and delivered by the several parties; and the certificate of the two special commissioners says that the deed was produced before them, and that the married women "acknowledged the same to be their respective acts and deeds." I think there was *prima facie* evidence that the deed was sealed.

MONTAGUE SMITH, J. Something was done with the intention of sealing the deed in question. I concur in granting this application, on the ground that the attestation is *prima facie* evidence that the deed was sealed, and that there is no evidence to the contrary.

Rule granted.

15
NATIONAL PROVINCIAL BANK v. JACKSON. Court of Appeal in Chancery, 1886 (33 Ch. Div. 1). — Maria and Ann Jackson, on January 18, 1883, conveyed land owned by them to their brother, R. J. Jackson, and he, on the following day, deposited the deeds with the plaintiff as an equitable mortgage; afterwards he absconded. On a bill by the plaintiff to enforce its security the defendants, Ann and Maria Jackson, produced two deeds dated the 18th of January, 1883, — which were found amongst Jackson's papers after he had absconded and of which they had known nothing, — whereby in consideration of natural love and affection for his sisters, the grantees, and of 10s. paid by each of them, R. J. Jackson purported to convey to them respectively the houses which had been by the above-mentioned indentures of the same date conveyed to him. These deeds were expressed to be signed, sealed, and delivered by R. J. Jackson, in the presence of W. R. Thompson, his clerk, and bore the signature of Jackson, but did not bear any seal or impression, but only the piece of ribbon to which the seal is usually affixed. The court held that these deeds were never executed.

COTTON, L. J., said: The defendants then contend, that the legal estate had become re-vested in them, and in support of this contention they produce two other instruments purporting to be reconveyances to them from their brother, and dated the 18th of January, 1883, the day before the charge to the plaintiffs. These instruments were not stamped until long after their date, and bear a stamp which denotes that for some reason or other the penalty was not enforced, as *prima facie* it would have been. This further is remarkable, that although these instruments are expressed to be signed, sealed, and delivered in the presence of the attesting witness, who was one of R. Jackson's clerks, there is no trace of any seal, but merely the piece of ribbon for the usual purpose of keeping the wax on the parchment. In my opinion the only conclusion we can come to is that these instruments were never in fact sealed at all. They were somehow or other prepared by R. Jackson, but never in fact executed by him in such a way as to reconvey the legal estate. It is said, and said truly, that neither wax nor wafer is necessary in order to constitute a seal to a deed, and that frequently, as in the case of a corporation party to a deed, there is only an impression on the paper; and *In re Sandilands*, Law Rep. 6 C. P. 411, was referred to, where an instrument had been forwarded from the colonies together with an official certificate of its having been duly acknowledged, and this was recognized by the court as a deed, although there was no seal but only the ribbon on it. That case is not now under appeal, but it is evident that the question was merely as to what was the true inference of fact, and although perhaps, having regard to the certificate, it was right there to hold that the deed had been sealed, here in my opinion it would be wrong to do so. It is true that if the finger be pressed upon the ribbon, that may amount to sealing; but no such

inference can be drawn here, where the attesting witness who has given evidence recollects nothing of the sort, and when Jackson had already committed one fraud in the matter, and perhaps then intended another. The question is merely one of fact, and upon the evidence it is impossible to conclude that these instruments were ever executed as deeds so as to reconvey the estate. That the sisters knew nothing of them is immaterial, as it was at any time open to them to accept the benefits which passed to them thereby; but the conclusion I come to is that the instruments never were sealed.

LINDLEY, L. J., said: Then comes the question whether the reconveyances were executed by Jackson. That is a question not of law but of fact. There is no trace of a seal upon them. It is true that it is unimportant what a seal is made of, but there must be something in the nature of an impression on the deed to denote that it has been sealed. On a question of fact it is useless to cite cases. *In re Sandilands* was, I think, a good-natured decision, in which I am not sure that I could have concurred. The court allowed the deed to be enrolled, and the choice lay between sending the deed back to Australia, and enrolling it for what it was worth. I am not sure that in that case I could have come to the conclusion that the deed had been duly executed; but on the evidence in this case I certainly cannot come to that conclusion. These reconveyances, therefore, in my opinion, were worthless for protecting the sisters' interests.

But cf. *Hamilton v. Dennis*, 12 Grant Ch. 325 (U. C. 1866).

In Virginia in 1791 it was held that a scroll was a seal. *Jones v. Logwood*, 1 Wash. 42. But in 1798, in *Baird v. Blaisgrove*, Ib. 170, the Court of Appeal expressed an opinion that an instrument to which a scroll was attached was not to be considered a deed without a statement in the instrument that it was sealed, or by proof that the scroll was intended as a seal; and in *Cromwell v. Tate*, 7 Leigh, 301 (1836), under a Statute, Va. Rev. Code, 1819, c. 128, § 94, which provided that "any instrument, to which the person making the same shall affix a scroll by way of seal, shall be adjudged and holden to be of the same force and obligation as if it were actually sealed," it was distinctly ruled "that a scroll must be recognized as a seal in the body of the instrument, in order to constitute it a deed," and this although the word "seal" was written in the scroll. (But an instrument purporting to convey land, having a scroll attached, and acknowledged by the grantor, was held to be a deed, though the scroll was not recognized as a seal in the body of the instrument. *Ashwell v. Ayres*, 4 Grat. 283 (Va., 1848). And see *Cosner v. McCrum*, 40 W. Va. 339, 345 (1896).

A like decision under a similar Statute was made in Missouri. *Cartmill v. Hopkins*, 2 Mo. 220 (1830); and see *Hacker's Appeal*, 121 Pa. 192 (1888).

In *Relph v. Gist*, 4 McCord, 267 (So. Car. 1827), it was held, on the other hand, that a scrawl with L. S. inside of it, placed on an instrument which did not purport to be sealed, was a seal, and that it might be shown by parol evidence that it was annexed by the grantor. See *Burton v. LeRoy*, 5 Sawyer, 510 (U. S. C. C. 1879); *Lorah v. Nissley*, 156 Pa. 329 (1898), *infra*; *Cochran v. Stewart*, 57 Minn. 499, 509 (1894).

But it has been held in some other States that a scroll is not a seal, although the instrument bearing it purports to be sealed. *Warren v. Lynch*, 5 Johns. 239 (N.Y. 1810). *Beardsley v. Knight*, 4 Vt. 471 (1832). *Douglas v. Oldham*, 6 N. H. 150 (1833). And see *Wain v. Wain*, 53 N. J. L. 429 (1891). Cf. *Barnard v. Gantz*, 140 N. Y. 249 (1893).

b In *Bates v. Boston & N. Y. Central R. R. Co.*, 10 All. 251 (Mass. 1865); a suit was brought in 1861 on a so-called bond of the Norfolk County Railroad Company, dated January 1, 1864. The instrument was printed, with the exception of the signatures of the treasurer and president, and a printed impression in the form of a seal was on it. The defendant pleaded the Statute of Limitations.

Dewey, J., said: "The defendants interpose the Statute of Limitations as a bar to any right on the part of the plaintiffs to enforce the payment of these bonds. By the Gen. Sts., c. 155, actions of contract founded upon any contract or liability not under

seal, except such as are brought upon a judgment or decree of some court of record of the United States, or of this or some other of the United States, shall be commenced within six years next after the cause of action accrues. Unless the exception as to contracts "under seal" applies to these certificates, they are clearly barred, as they became due and payable on the 1st of January, 1854, and no action was commenced within six years from that date. But the plaintiffs insist that the contracts they now seek to enforce are under seal, and so are embraced in the exception clause. The Rev. Sta. c. 120, § 1, have provisions similar to the Gen. Sta., and it is the former that are applicable to this case, if any, as the six years' limitation had taken effect before the Gen. Sta. went into operation. The character of these contracts in a legal point is to be determined by the law as it existed when the contracts were made. To decide what constitutes a contract under seal, as applicable to this case, we must resort to the common law doctrine as held in Massachusetts at that time, for we had then no Statute as to what should constitute seals in cases of personal contracts. We had a provision as to seals of the courts and public offices, where the same were required by law, declaring as to such cases that the word "seal" should be construed to include an impression of such official seal made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto. Rev. Sta. c. 2, § 6. This authority, confined as it was to courts and public offices, yet obviously contemplated something more than a printed impression upon the instrument made by the printer in connection with the printing of the blank writ or certificate. The common law doctrine as to a seal was, that there must be a wafer or wax, or some other tenacious substance capable of receiving the impression of a seal made upon it. It was so assumed in *Commonwealth v. Griffith*, 2 Pick. 18; *Bradford v. Randall*, 5 Pick. 496; and *Tasker v. Bartlett*, 5 Cush. 364. It was fully considered and settled in New York, in the case of *Warren v. Lynch*, 5 Johns. 239, and recognized in *Farmers' and Manufacturers' Bank v. Haight*, 3 Hill, 493, and other cases. The theory of the purpose of seals, as expounded by Kent, C. J., in *Warren v. Lynch*, was, that it required greater ceremony and solemnity in the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed.

"So well settled has the law been in this respect that no one, we suppose, doubts as to the nature of the seals required upon contracts made by individuals. The practice that has recently prevailed of making a printed impression purporting to be a seal on contracts of corporations, as a substitute for the common law seal, has with us no legal foundation or authority, except so far as it has been sanctioned by our Statutes. The attempt to make a substitute for the common law seal in the present instance was a greater departure than that of impressing the actual seal of the corporation upon paper alone. This was the mere printing of a fac-simile of the seal at the same time and by the same agency as the printing of the certificates, to be afterwards signed by the president and treasurer. As to the seal, nothing was left to be done by the officers of the corporation, who alone were authorized to affix the corporate seal. This practice is certainly in derogation of the whole theory of sealing contracts. It was the fact that the obligor did two independent acts, first, that of signing, and secondly, that of sealing, that in the theory of the law gave so much more solemnity to the contract, and imported so much greater deliberation, and therefore entitled it to be enforced without any proof of a particular consideration or recital that it was for value received, as well as extended its vitality beyond the period of six years, and excepted it from the bar incident to all personal contracts which were merely signed by the promisor.

"We were referred by the counsel for the plaintiffs to Sugden on Powers (8th ed.), 232, as sustaining the form of seal here used; but upon examination of that treatise, we think it fails so to do. While the writer holds that it is not necessary to use wax or a wafer, though citing no authorities for this opinion, he clearly rejects the case of a seal impressed by blocks or types in connection with the printing of the instrument that is to be the contract when duly executed by the properly authorized officer of the corporation, stating that in the execution of a deed there are required three distinct acts: 1. The determination in the mind to do the act. 2. The signing of the instru-

ment. 3. The sealing. As to the latter, he says: "If the seal, stick, or other instrument used, be impressed by the party on the plain parchment or paper with intent to seal it, it is clearly sufficient." This is undoubtedly a modification of the common law doctrine of a seal, as we have it in 3 Inst. 169, and as the same has been understood in this Commonwealth; but even this does not give validity to any such form of sealing as was adopted in these certificates. The statement of Mr. Sugden as to the presumption of a seal where it is recited in the deed to have been sealed, that it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper, if correct (but as to which we have the authority of Kent, C. J., citing Perkins, § 129, to the contrary, in the case of *Warren v. Lynch*, 5 Johns. 239), would not aid the present case, because here no presumption arises, as all that was done is visible to the eye and remains unchanged. If that which appears on the instrument is not a seal, we have no right to presume that the instrument was sealed.

"The case of *The Queen v. St. Paul*, 9 Jur. 442; s. c. 7 Q. B. 232, cited by the plaintiffs, is in some respects more favorable to them, as the objection there taken to the seal was, that it was an impression made by means of a wooden block. That case arose upon an appeal from an order of certain justices, for the removal of one T. H. Other objections to sustaining the order were also taken, and they were held sufficient, irrespective of that as to the seal. As to that, the court say: "We do not wish there should be any doubt upon the point as to the validity of the seal. We seal in this way; but we hold the order bad on another ground." This was a judicial process, and the remarks as to the seal were with reference to judicial processes, and not applied to cases of personal contracts. We know that to some extent such practice has prevailed as to judicial processes in those States where the common law rule has been held strictly as to the seals of individuals. We are also aware that in many of our sister States a different rule prevails, as to what is necessary to constitute a sealed contract, from that which has been uniformly held in Massachusetts. In some of them this is founded upon Statute provisions, and in others upon long usage, recognized by judicial decisions. But, in the absence of any such Statute or usage, the scroll, whether made by a pen or types, does not change the character of the instrument from a simple contract to one under seal, or give it the legal effect of importing a consideration when none is expressed, or extending the Statute of Limitations from the period of six to twenty years. Such contract is entitled to all the binding effect upon the promisor that a contract not under seal has, and nothing more. In the present instance, the contract recites that it is given "for value received," and assumes in that respect the form of a promissory note rather than a bond.

"Our course of legislation fully confirms the opinion that this was the well understood law with us. It was because this was so that the various Statutes modifying our common law in this respect have been adopted; and the further inquiry is, whether, by force of any Statute, these certificates may be deemed contracts under seal. Clearly no such Statute existed at the time of their execution and delivery. The earliest Statute on the subject was that of 1855, c. 223. But that Statute was not retrospective, or applicable to instruments previously executed. It cannot be so construed as to affect contracts which were made before its enactment. *North Bridgewater Bank v. Copeland*, 7 Allen, 139, and cases there cited." And see *Dean v. American Legion of Honor*, 156 Mass. 485, 486 (1892). *Contra, Osborn v. Kistler*, 35 Ohio St. 99 (1878).

A "PAPER with an impression upon it, apparently spread with gum on its under side and affixed to the deed, by moistening the gum, without the addition of any wafer or wax," is a good seal. *Tasker v. Bartlett*, 5 Cush. 359 (Mass. 1850). A piece of paper attached by a wafer is a good seal. *Pease v. Lawson*, 33 Mo. 35 (1862). So if attached by mucilage, *Turner v. Field*, 44 Mo. 382 (1869). See *Bradford v. Randall*, 5 Pick. 496, 497 (Mass. 1837).

An impression in the substance of paper with the seal of a corporation is a good seal, although there be no wax or other intervening substance. In *Corrigan v. Trenton Delaware Falls Co.*, 1 Halst. Ch. 52 (1845), the opinion of HALSTED, C., was as follows:

"I do not consider the decisions of the Supreme Court in reference to ink scrolls, as ruling this question. According to Lord Coke, a seal is wax with an impression, because wax without an impression is not a seal. '*Sigillum est cera impressa, quia cera sine impressione non est sigillum.*' It is clear that by this definition the impression makes the seal. It is true that if this definition is strictly taken, there must not only be an impression, but that impression must be made on wax. But the impression is the *sine qua non* of Lord Coke's seal; the wax is only auxiliary; it adheres to the paper and receives the impression, and is the material which annexes the impression to the instrument. But we have long since grown out of the substance or essence of Lord Coke's definition, the impression; the question is, are we yet fast in the wax?

"We have said by long practice, that both these were not necessary. With which of them would Lord Coke have been the better satisfied? Clearly with the impression; nay, he would not have dispensed with that at all. What proportion of the seals used on private papers nowadays would fall within his definition? A wafer placed at the end of the name, with a piece of paper on it, or without the piece of paper, and without any impression, is a seal; and by the same rule or reasoning or absence of reasoning, a drop of sealing-wax dropped in proper position in relation to the name, and without impression, or bit of paper upon it, would be a seal; provided the writing called for a seal. Lord Coke's definition has been entirely departed from, and the mere wax or wafer, put on to receive the seal, is recognized as the seal. How can it be said that the impression, the essence of the definition, appearing on the paper, is no seal, because it is impressed without wax? Chief Justice Kent, in the case of *Warren v. Lynch*, 5 John. Rep. 238, which decides that an ink scroll is no seal, says, 'The law has not, indeed, declared of what precise materials the wax shall consist, and whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression, is, perhaps, not material.' Is any such matter material then, if the seal can be impressed without it? In the above cited case, Chief Justice Kent says, 'The scroll has no one property of a seal.' It is evident from this that he does not consider a scroll as an impression; and here there is a distinction between the case of *Warren v. Lynch* as to scrolls, and the like decisions of our Supreme Court, and the case before us; for here the impression appears, and it is the impression of the corporate seal, the known, recognized and distinctive seal of the party executing the paper. If wax without the impression of a distinctive seal has come to be a seal, I do not see why the impression of a distinctive seal on the paper itself should be rejected as no seal, simply because it is made to appear on the paper without wax.

"Perhaps as succinct and sensible an account of the ancient use of seals as is to be found, is that given in 1 Morgan's Essays, 83. It is there said, 'The seals of private persons are not full evidence by themselves, for it is not possible to suppose these seals to be universally known, and consequently they ought to be attested by something else, *i. e.*, by the oath of some that have knowledge of them [that is, knowledge that the person whose seal it purports to be, uses that seal]; and when these seals are thus attested, they ought to be delivered in to the jury, because, though part of their credit arises from the oath that gives an account of their sealing, yet another part of their credit arises from the distinction of their own impression; for certainly every family had its own proper seal, as it is now in corporations. By this they distinguished their manner of contracting one from the other, and by false impressions of the seals they discovered a counterfeit contract; and therefore it was not the oath, but the impression of the seal accompanying it, that made up the complete credit of the instrument. But since, in private contracts, the distinction of sealing is in general worn out of use, and men usually seal with any impression that comes to hand, to be sure, there must be evidence of putting the seal; because, at this day, little can be discovered from the bare impression.' This is, of course, spoken of private seals, as now used, and not of corporate seals.

"In 1805, Justice Livingston, in delivering the opinion of the court in *Meredith v. Hinsdale*, 2 N. Y. Term Rep. 362, holds this language: 'However ancient the use of seals as a mark of authenticity to instruments may be, or to whatever cause their

origin may be ascribed, it is certain that, in modern times, a private seal is not regarded as evidence of truth, or of belonging to the party to whose signature it is affixed; but that men promiscuously use each other's seals, without attention to the impression or coat of arms. Thus it is no uncommon thing to see a seal containing the device, arms, and perhaps name of one person used to authenticate the instrument of another. If it be not necessary, then, that in sealing a deed, the grantor should affix his own, but may adopt the seal of a stranger, why should it be exacted that the materials on which the impression is made should be of wax, wafer, or of any other particular composition? Why should not any impression or mark answer as well as the common mode of sealing, provided it be durable, whether it be stamped on the paper itself, or on something laid upon it, if it be made as a solemn act of confirmation, and deliberately acknowledged as the seal of the party making it? But the cause was decided on another point. The instrument being made in Pennsylvania, where a scroll is recognized as a seal, the court in New York treated it as such, adopting the law of the place of the contract. At this time Kent was Chief Justice, and Thompson, Livingston, Spencer, and Tompkins, justices.

"Five years afterwards, the question came up again before the Supreme Court of New York, in the case of *Warren v. Lynch*, 5 John. Rep. 238. Kent, Chief Justice, and Justices Thompson and Spencer, were still on the bench, and the places of Justices Livingston and Tompkins had been supplied by Justices Van Ness and Yates. The question in this case arose on a paper writing in other respects in the form of a note, concluding, 'Witness my hand and seal,' signed by the maker, with the letters L. S. enclosed in an ink scroll, placed at the end of the name, where a seal is usually affixed to sealed instruments. The question was, whether by the laws of New York, this was a sealed instrument. The opinion was delivered by the Chief Justice. Before proceeding to examine the question, he takes occasion to say that what was said by Justice Livingston, in *Meredith v. Hinsdale*, in reference to the ink scroll, was his own opinion, and not that of the court. He then says that the object in requiring seals, as he presumes, was misapprehended by President Pendleton and by Mr. Justice Livingston. It was not, as they seem to suppose, because the seal helped to designate the party who affixed it to his name; for one person might use another's seal. The policy of requiring seals consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed. Now these two ideas are not at all opposed to each other; the reason may be, as Chief Justice Kent states, to give ceremony and solemnity, and yet the seal might, and no doubt did, in ancient times, help to designate the person who affixed it to his name. The expression, 'One person might use another's seal,' is proof that in ancient times, before chirography became general, some had their distinctive seals, and that the seal helped to designate the person who affixed it to his name; and if it were not so, why the ancient idea of giving sealed instruments to the jury?

"A word as to the solemnity spoken of by Chief Justice Kent. Does it consist in the mere symbol? Is there any more solemnity in a bit of wafer than in a scroll made with a pen? The feeling of solemnity, if any, attending the execution of a sealed instrument, arises from a sense of the effect of the instrument, and not from the symbol used to characterize it as a sealed instrument; and as to the remark of the court, that to adopt a scroll for a seal would be to abolish all distinction between writings sealed and writings not sealed, I apprehend, with great respect, it was not well considered. Our Statute authorizing a scroll for a seal to money bonds, has had no such effect, and, on the principle above stated, could have no such effect.

"Instruments are now proved by proving the putting of the seal, by producing the subscribing witness, who swears to the signature, and the acknowledgment of the seal. The seal may be wax or wafer, without paper or with, and without impression, and the same man may use, as a seal, one thing to-day, and another to-morrow. As seals are used now, there seems to be no good reason why I may not affix a scroll, and acknowledge that to be my seal.

"But it is not necessary, on this occasion, to come in conflict with the decisions of the Supreme Court as to ink scrolls. I am of opinion that the impression of a distinctive corporation seal, on an instrument calling for the seal of the corporation, is a lawful seal."

So are *Allen v. Sullivan R. R. Co.*, 32 N. H. 446 (1855); *Hendee v. Pinkerton*, 14 Allen, 381 (Mass. 1867); *Royal Bank of Liverpool v. Grand Junction R. R. Co.*, 100 Mass. 444 (1868). As to the seal of a court, see *Pillow v. Roberts*, 18 How. 473 (U. S. 1851). In *Follett v. Rose*, 8 McLean 382, 385 (U. S. C. C. 1844), it was said by McLEAN, J., "Wax or wafer is not essential, or a scrawl, to make a seal. An impression on the parchment or paper, with an intent to make a seal, is sufficient." But see, *contra*, *Bank of Rochester v. Gray*, 2 Hill, 227 (N. Y. 1842); *Farmers' Bank v. Haigh*, 3 Hill, 498 (N. Y. 1842).

In *Lorah v. Nissley*, 156 Pa. 329 (1898), the defendant signed an instrument, made up from a printed blank. Opposite spaces for signatures, the word "seal" had been printed. There was no recital of sealing. The court held, that the instrument was sealed, saying, p. 330:

"The days of actual sealing of legal documents, in its original sense of the impression of an individual mark or device upon wax or wafer, or even on the parchment or paper itself, have long gone by. It is immaterial what device the impression bears, *Alexander v. Jameson*, 5 Bin. 288, and the same stamp may serve for several parties in the same deed. Not only so, but the use of wax has almost entirely, and even of wafers very largely, ceased. In short sealing has become constructive rather than actual, and is in a great degree a matter of intention. It was said more than a century ago in *McDill's Lessee v. McDill*, 1 Dal. 63, that 'the signing of a deed is now the material part of the execution; the seal has become a mere form, and a written or ink seal, as it is called, is good;' and in *Long v. Ramsay*, 1 S. & R. 72, it was said by TILGHMAN, C. J., that a seal with a flourish of the pen 'is not now to be questioned.' Any kind of flourish or mark will be sufficient if it be intended as a seal. 'The usual mode,' said TILGHMAN, C. J., in *Taylor v. Glaser*, 2 S. & R. 502, 'is to make a circular, oval, or square mark, opposite to the name of the signer; but the shape is immaterial.' Accordingly it was held in *Hacker's Appeal*, 121 Pa. 192, that a single horizontal dash, less than an eighth of an inch long, was a sufficient seal, the context and the circumstances showing that it was so intended. On the other hand in *Taylor v. Glaser*, *supra*, a flourish was held not a seal, because it was put under and apparently intended merely as a part of the signature. So in *Duncan v. Duncan*, 1 Watts, 323, a ribbon inserted through slits in the parchment, and thus carefully prepared for sealing, was held not a seal, because the circumstances indicated the intent to use a well-known mode of sealing, by attaching the ribbon to the parchment with wax or wafer, and the intent had not been carried out.

"These decisions establish beyond question that any flourish or mark, however irregular or inconsiderable, will be a good seal, if so intended, and a fortiori the same result must be produced by writing the word 'seal' or the letters 'L. S.,' meaning originally locus sigilli, but now having acquired the popular force of an arbitrary sign for a seal, just as the sign '&' is held and used to mean 'and' by thousands who do not recognize it as the Middle Ages manuscript contraction for the latin 'et.'

"If therefore the word 'seal' on the note in suit had been written by Nissley after his name, there could have been no doubt about its efficacy to make a sealed instrument. Does it alter the case any that it was not written by him, but printed beforehand? We cannot see any good reason why it should. Ratification is equivalent to antecedent authority, and the writing of his name to the left of the printed word, so as to bring the latter into the usual and proper place for a seal, is ample evidence that he adopted the act of the printer in putting it there for a seal. The note itself was a printed form with blank spaces for the particulars to be filled in, and the use of it raises a conclusive presumption that all parts of it were adopted by the signer, except such as were clearly struck out or intended to be

cancelled before signing. The pressure of business life and the subdivision of labor in our day, have brought into use many things ready-made by wholesale which our ancestors made singly for each occasion, and among others the conveniences of printed blanks for the common forms of written instruments. But even in the early days of the century, the act of sealing was commonly done by adoption and ratification rather than as a personal act, as we are told by a very learned and experienced, though eccentric predecessor, in language that is worth quoting for its quaintness: 'Illi robur et aes triplex. He was a bold fellow who first in these colonies, and particularly in Pennsylvania, in time whereof the memory of man runneth not to the contrary, substituted the appearance of a seal by the circumflex of a pen, which has been sanctioned by usage and the adjudication of the courts, as equipollent with a stamp containing some effigies or inscription on stone or metal. . . . How could a jury distinguish the hieroglyphic or circumflex of a pen by one man from another? In fact the circumflex is usually made by the scrivener drawing the instrument, and the word seal inscribed within it.' BRACKENRIDGE, J., in *Alexander v. Jameson*, 5 Bin. 238, 244.

"We are of opinion that the note in suit was duly sealed."

In *Deming v. Bullitt*, 1 Blackf. 241 (Ind. 1823); *Armstrong v. Pearce*, 5 Harrington, 351 (Del. 1851); and *McPherson v. Reese*, 58 Miss. 749 (1881), instruments purported to be sealed, but no seals were annexed. Held not to be deeds. It is possible that in these cases there might have been positive proof that seals were not affixed, but *semble*, the courts meant that the statement in the instruments that they were under seal did not raise a presumption that they were so. But see *Cook v. Cooper*, 59 So. Car. 660 (1900).

Several persons may adopt the same seal as their seal. *Tasker v. Bartlett*, 5 Cush. 359 (Mass. 1850); *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35 (1873); *Lunsford v. La Motte Lead Co.*, 54 Mo. 423 (1873); *Ryan v. Cooke*, 172 Ill. 302 (1898).

On Statutes in the United States concerning seals, see Stimson, §§ 1564, 1565.

SECTION II.

DELIVERY.

NOTE. — *T. v. K.*, Y. B. 10 Hen. VI. 25. John T. brought an action of debt on three obligations against one K.

Newton [for the defendant]. We say that the deeds on which the plaintiff has conceived his action were written and sealed by the defendant, and the defendant delivered them to H. E. as three writings, to wit, if the plaintiff should make a defeasance on a certain condition, and deliver it to the said H. E. to deliver to the defendant, and also that if the son of the plaintiff should make a release to the plaintiff of all manner of actions, and deliver the said release to the said H. E. to deliver to the defendant, then the said H. E. should deliver to the plaintiff the said escrows as deeds; and we say that neither the defeasance nor the release was made or delivered to the said H. E., and afterwards the plaintiff took the escrows out of the possession of the said H. E. So they are not the deeds of the defendant. Ready.

Fulthorpe [for the plaintiff]. You see how the defendant has acknowledged by his plea, that he made the said obligations, and delivered them to H. E. to deliver to the plaintiff, so he has acknowledged the obligations to be deeds and to the matter alleged by him no law obliges us to render judgment. And we pray our debt and damages &c.

PASTON [J.]. The plea is good enough; for if I bind myself by a writing, it is not my deed, because it is not *offe* [i] to another man, and I seal the said writing without livery, if afterwards he gets the said writing it is not my deed, because it is but an

escrow, until livery be made to him. So in this case when the condition is not performed, there must be livery. Wherefore, &c.

STRANGEWAYS [J.]. The case that you have put is not like this case, for in your case no livery was ever made, but in this case livery was made to H. E. on condition to deliver to the plaintiff; then notwithstanding that the condition be not performed, he cannot avoid the deeds which he has acknowledged by such condition without specialty. Wherefore, &c.

PASTON [J.]. If I make a deed for twenty pounds to James Strange, and I deliver the said deed to another as an escrow, then if Strange gets the deed afterwards, and brings an action against me, I may well say it is not my deed, because no livery was ever made that Strange should have the deed; so in this case when the condition is not performed, they are not the deeds of the defendant, because the deeds were delivered to the said H. E. as three escrows, unless the conditions were performed. Wherefore, &c.

COTESMORE [J.]. In your case no livery was ever made, to wit: that he to whom the obligations were made had livery of the said deeds; but in this case they were delivered to this said H. E. to deliver to the plaintiff on the conditions *ut supra*. Then if H. E. had delivered the deeds against the conditions, he is chargeable to the defendant by writ of detinue. Wherefore, &c.

Newton demurred in law that the plea was good. And demanded judgment, if the action, &c.

Fulthorpe did not dare to demur, but said that they were deeds. Ready, *et alii contra*.

DEGORY AND ROE'S CASE.

COMMON PLEAS. 1589, 1591.

[*Reported 1 Leon. 152.*]

DEGORY brought debt upon an obligation against Roe, as heir to his ancestor. The defendant pleaded, That his ancestor by his deed did covenant with Sir W. Winter and A. Marsh, to stand seised to the use of himself for life, and afterwards to the use of the defendant and his heirs, and so he had nothing by descent. The plaintiff *replicando* said, *Non convenit*; and it was found by special verdict that such a deed of covenant was made by the ancestor of the defendant, but the first use was limited to the covenantor and his wife, for their lives, &c., and that he delivered the same to I. S. as his deed, to the use of the said Sir W. Winter and the said Marsh, if the said Sir W. Winter would agree to the same, and take the charge of it upon him, and if he will not agree, that then it should not be his deed, and further found, that Sir W. Winter died before any agreement; and it was moved by PERIAM [J.], If the same be presently the deed of the ancestor, or if it do not take effect till the condition be performed, *sci.*, until Sir W. Winter hath agreed to it. See 14 H. 8, 17, 18, 19, 20, 23. And by WALMESLY [J.], The same is not the deed of the ancestor until Sir William hath agreed; but by ANDERSON [C. J.] and PERIAM [J.], Although Sir William Winter doth not agree to it, yet it is the deed of Roe; for although a deed be upon condition, *ut supra*, yet because he delivered it as his deed, and the condition is subsequent to it, it shall be taken

for his deed, and the condition after shall be void, because repugnant: for although that in estates limited to men, the estate may be precedent, and the condition subsequent, and the not performance of the condition may destroy the estate, for the estate is always subject to the condition, yet it is not so in deeds, for being once the deed of the party, it can never cease to be his deed, after it is once delivered as his deed. OWEN [J.], Although the same be the deed of the party, yet it is not well pleaded; and he conceived the issue is found against him, for the covenant is pleaded, to stand seised unto the use of himself for life, the remainder over: to which the plaintiff *replicando* saith, *Non convenit*; so as the issue is, if any such deed of covenant was, and the jury find, That the covenant was to stand seised to the use of himself, and his wife, &c., so as it is not such a deed as the defendant hath pleaded, for other estates are limited by it, and therefore it shall not be intended the same deed. PERIAM [J.], The same is not material, for the substance of the plea is, nothing by descent, &c., and it was adjourned.

[Leonard reports the case as of Trinity Term, 31 Eliz. Under Hilary Term, 38 Eliz., Moore, page 300, *sub nom. Degoze v. Rowe*, gives the conclusion of the case as follows:—]

And the judges adjudged with the plaintiff, namely, that the father *non convenit*; the reason was because the agreement of Sir William Winter is condition precedent to the essence of the deed, and it is not like where a deed is delivered to one to the use of another; there if the other dies before disagreement, or notice, the deed is good, because there is no condition, but in the principal case the condition by the circumstances is precedent.

27 WHYDDON'S CASE.

COMMON PLEAS. 1596.

[Reported Cro. El. 520.]

ANNUITY. The defendant saith, that he delivered the deed of annuity to the plaintiff as an escrow, to be his deed upon a certain condition to be performed, otherwise not: and that the condition was not yet performed. The plaintiff demurred; and, without argument, adjudged for the plaintiff: for the delivery of a deed cannot be averred to be to the party himself as an escrow. *Vide* 19 Hen. 8, pl. 8; 29 Hen. 8; and *Morice's Case*, Dyer, 34 b, 35 a, in margin.¹

Co. LIT. 36 a. If a man deliver a writing sealed, to the party to whom it is made, as an escrow to be his deed upon certain conditions, &c., this is an absolute delivery of the deed, being made to the party himself,

¹ See accord, *Williams v. Green*, Cro. El. 884; s. c. Moore 642 (1601); *Thoroughgood's Case*, 9 Co. 186 b (1612); *Bushell v. Pasmore*, 6 Mod. 217, 218 (1704); *Braman v. Bingham*, 28 N. Y. 483 (1863); *Hubbard v. Greeley*, 84 Me. 340, 344 (1892). Cf. *Hawkesland v. Gatchel*, Cro. El. 885 (1600); *Hudson v. Revett*, 5 Bing. 368, 368 (1829).

for the delivery is sufficient without speaking of any words (otherwise a man that is mute could not deliver a deed), and tradition is only requisite, and then when the words are contrary to the act which is the delivery, the words are of none effect, *non quod dictum est, sed quod factum est inspicitur*. And hereof though there hath been variety of opinions, yet is the law now settled agreeable to judgments in former times, and so was it resolved by the whole Court of Common Pleas. But it may be delivered to a stranger, as an escrow, &c., because the bare act of delivery to him without words worketh nothing. And this is the ancient diversity in our books, the record whereof I have seen agreeable with the reason of our old books. And as a deed may be delivered to the party without words, so may a deed be delivered by words without any act of delivery, as if the writing sealed lieth upon the table, and the feoffor or obligor saith to the feoffee or obligee, Go and take up the said writing, it is sufficient for you, or it will serve the turn: or, Take it as my deed, or the like words, it is a sufficient delivery.

SHEP. TOUCH., 58, 59. The delivery of a deed as an escrow is said to be where one doth make and seal a deed, and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two cautions must be heeded. 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made. — The words therefore that are used in the delivery must be after this manner: I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that he do deliver to you £20 for me, or upon condition that he deliver up the old bond he hath of mine for the same money, or as the case is. Or else it must be thus: I deliver this as an escrow to you, to keep until such a day, &c. upon condition that if before that day he to whom the escrow is made shall pay to me £10, or give to me a horse, or enfeof me of the manor of Dale, or perform any other condition; that then you shall deliver this escrow to him as my deed. For if when I shall deliver the deed to the stranger, I shall use these or the like words; I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions; or, I deliver this to you as my deed to deliver to him to whom it is made when he comes to London; in these cases the deed doth take effect presently, and the party is not bound to perform any of the conditions.¹ So it must be delivered to a stranger; for if I seal my deed and deliver it to the party himself to whom it is made as an escrow upon certain conditions, &c. in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions; for, *In traditionibus chartarum, non quod dictum, sed quod factum est*,

¹ But see *State Bank v. Evans*, 3 Green, 155 (N. J. L. 1835).

inspicitur. But in the first cases before, where the deed is delivered to a stranger, and apt words are used in the delivery thereof, it is of no more force until the conditions be performed, than if I had made it, and laid it by me, and not delivered it at all; and therefore in that case albeit the party get it into his hands before the conditions be performed, yet he can make no use of it at all, neither will it do him any good. But when the conditions are performed, and the deed is delivered over, then the deed shall take as much effect as if it were delivered immediately to the party to whom it is made, and no act of God or man can hinder or prevent this effect then, if the party that doth make it be not at the time of making thereof disabled to make it. He therefore, that is trusted with the keeping and delivering of such a writing, ought not to deliver it before the conditions be performed; and when the conditions be performed, he ought not to keep it, but to deliver it to the party. For it may be made a question, whether the deed be perfect, before he hath delivered it over to the party according to the authority given him. Howbeit it seems the delivery is good, for it is said in this case, that if either of the parties to the deed die before the conditions be performed, and the conditions be after performed, that the deed is good; for there was *traditio inchoata* in the life-time of the parties; *et postea consummata existens* by the performance of the conditions, it taketh its effect by the first delivery, without any new or second delivery; and the second delivery is but the execution and consummation of the first delivery. And therefore if an infant, or woman covert, deliver a deed as an escrow to a stranger, and before the conditions are performed, the infant is become of full age, or the woman is become sole, yet the deed in these cases is not become good. And yet if a disseisee make a deed purporting a lease for years, and deliver it to a stranger out of the land as an escrow, and bid him enter into the land, and deliver it as his deed, and he do so, this is a good deed, and a good lease, so that to some purposes it hath relation to the time of the first delivery, and to some purposes not.

41

THOMPSON v. LEACH.

COMMON PLEAS, KING'S BENCH, HOUSE OF LORDS. 1690.

[Reported 3 Lev. 284.]

EJECTMENT upon the demise of Charles Leach, and on *Not Guilty* and a special verdict, the case was thus: Simon¹ Leach being tenant for life, remainder to his first son in tail,² remainder to Sir Simon Leach in tail. Simon Leach makes a deed of surrender to Sir Simon before the birth of any son of Simon, and afterwards had a son, viz. Charles the lessor of the plaintiff. Simon keeps the deed of surrender in his hands, and Sir Simon had no knowledge of it until five years after the said son's birth. But as soon as he had notice of it, he accepted it, and entered on the lands; after which Simon dies, and Charles the son brings the ejectment: and whether the contingent remainder was destroyed by this surrender, was the question. And after divers arguments, POLLEXFEN, Chief-Justice, POWELL and BOKESBY, Justices, held, that the estate did not pass by the surrender until the acceptance of it; and for this they relied much on the constant form of pleading surrenders, wherein always the precedents are not only to plead the surrender, but also with an acceptance, viz., that the surrenderee agreed thereto, except one or two in Rastal; and divers other authorities were cited in the case *pro* and *con*, and that then the surrender not taking effect, nor the estate for life merged before the birth of the son, he had a good title. 2. The said three judges held, that the acceptance afterwards should not so relate to the making of the deed, as to cause the estate to pass *ab initio*, and so by relation to make it a surrender before the son's birth, so as to destroy his estate; for that would be to make a relation work to the prejudice of a third person, and relations do always make acts good only between the parties themselves, but not to prejudice strangers, as Co. 3 Rep., *Butler and Baker's Case*. But JUSTICE VENTRIS to the contrary held, that the estate vested immediately by the making the deed of surrender; but to be divested by the surrenderee's refusal to accept it afterwards, but that until such refusal the estate was in the surrenderee; and divers cases were cited on that side also: and he also held, that if it did not vest at the first by the delivery of the deed of surrender, yet by the acceptance afterwards it should be by relation a surrender from the beginning, and so destroy the contingent remainder to Charles the son born afterwards; and this relation does no wrong to a third person, for Charles was not a person *in esse* when the surrender was first made. But by the opinion of the other three judgment was given for the plaintiff, upon which error was brought in B. R. and in Hill. 3 W. & M. the judgment given in C. B. was affirmed by the

¹ Levinz calls him "Nicholas;" but the other reports show that his name was "Simon."

² The other reports show that the remainder was to the first and other sons in tail.

whole court. But afterwards the defendant brought error thereof in the House of Peers; and in December, 1692, on hearing of the judges there, they all continuing in their former opinion (except SIR ROBERT ATKINS, Chief Baron, and then Speaker of the House of Peers), the judgment was reversed by the Lords in Parliament, the said SIR ROBERT ATKINS and MR. JUSTICE VENTRIS concurring with them as before.

Levinz, of counsel for the defendant.¹

¹ The dissenting opinion of VENTRIS, J., in the Court of Common Pleas, which was afterwards adopted in the House of Lords, is thus given in his report of this case in 2 Vent. 198 :—

“Upon this record the case is no more than thus; Simon Leach, tenant for life, remainder to his first son, remainder in tail to Sir Simon Leach. Simon Leach before the birth of that son by deed, sealed and delivered to the use of Sir Simon (but in his absence and without his notice) surrenders his estate to Sir Simon, and continues the possession until after the birth of his son; and then Sir Simon Leach agrees to the surrender, whether this surrender shall be taken as a good and effectual surrender before the son born.

“There are two points which have been spoken to in this case at the bar.

“First, whether by the sealing of the deed of surrender the estate immediately passed to Sir Simon Leach; for then the contingent remainder could not vest in the after-born son, there being no estate left in Simon Leach his father to support it?

“Secondly, whether after the assent of Sir Simon Leach, though it were given after the birth of the son, doth not so relate as to make it a surrender from the sealing of the deed, and thereby defeat the remainder which before such assent was vested in the son?

“I think these points include all that is material in the case, and I shall speak to the second point, because I would rid it out of the case. For as to that point I conceive, that if it be admitted, that the estate for life continued in Simon Leach till the assent of Sir Simon, that the remainder being vested in Charles the second son before such assent, there can be no relation that shall divest it.

“I do not go upon the general rule, that relations shall not do wrong to strangers.

“’T is true, relations are fictions in law, which are always accompanied with equity.

“But ’t is as true, that there is sometimes loss and damage to third persons consequent upon them; but then ’t is what the law calls *damnum absque injuria*, which is a known and stated difference in the law, as my Brother Pemberton urged it. But I think there needs nothing of that to be considered in this point.

“But the reason which I go upon is, that the relation here, let it be never so strong, cannot hurt or disturb the remainder in Charles Leach in this case; for that the remainder is in him by a title antecedent and paramount to the deed of surrender, to which the assent of Sir Simon Leach relates, so that it plainly overreaches the relation.

“If an estate in remainder, or otherwise, ariseth to one upon a contingency or a power reserved upon a fine or feoffment to uses, when the estate is once raised or vested it relates to the fine or feoffment, as if it were immediately limited thereupon, 1 Co. 133, 156. So this remainder, when vested in Charles, he is in immediately by the will, and out of danger of his remainder being divested by any act done since, as the surrender is.

“I will put one case, I think full to this matter, and so dismiss this point.

“It cannot be denied, but that there is as strong a relation upon a disagreement to an estate, as upon an agreement, where the estate was conveyed without the notice of him that afterwards agrees or disagrees; if the husband discontinues the wife’s estate, and then the discontinuance conveys the estate back to the wife in the absence of the husband, who (as soon as he knows of it) disagrees to the estate, this shall not take away the remitter which the law brought upon the first taking the estate from the dis-

DOE d. GARNONS v. KNIGHT.

32

KING's BENCH. 1826.

[Reported 5 B. & C. 671.]

THIS was an ejectment brought to recover possession of certain messuages and lands in the County of Flint. The lessor of the plaintiff

continues. And so is Lit. cap. Remitter, Co. 11 Inst. 356 b. The true reason is, because she is in of a title paramount to the conveyance to which the disagreement relates, though that indeed was the foundation of the remitter, which by the disagreement might seem to be avoided. This therefore I take to be a stronger case than that at the bar: so that if there were no surrender before the birth of Charles the son, there can be none after by any construction of law; for that would be in avoidance of an estate settled by a title antecedent to such surrender, whereas relations are to avoid mesne acts; and I believe there can be no case put upon relations that go any further, and it would be against all reason if it should be otherwise.

"But as to the first point, I am of opinion, that upon the making of the deed of surrender, the freehold and estate of Simon Leach did immediately vest in Sir Simon, before he had notice, or gave any express consent to it; and so it was a surrender before Charles was born, and then the contingent remainder could never vest in him, there being no particular estate to support it.

"A surrender is a particular sort of conveyance that works by the common law. And it has been agreed, and I think I can make it plainly appear, that conveyances at the common law, do immediately (upon the execution of them on the grantor's part) divest the estate out of him, and put it in the party to whom such conveyance is made, though in his absence, or without his notice, till some disagreement to such estate appears. I speak of conveyances at the common law; for I shall say nothing of conveyances that work upon the Statute of Uses, or of conveyances by custom, as surrenders of copyholds, or the like, as being guided by the particular penning of Statutes, and by custom and usage, and matters altogether foreign to the case in question.

"In conveyances that are by the common law, sometimes a deed is sufficient (and in surrenders sometimes words without a deed) without further circumstance or ceremony; and sometimes a further act is requisite to give them effect, as livery of seisin, attornment, and sometimes entry of the party, as in case of exchanges; and as well in those conveyances that require a deed only, as those which require some further act to perfect them, so soon as they are executed on the grantor's part, they immediately pass the estate. In case of a deed of feoffment to divers persons, and livery made to one feoffee in the absence of the rest, the estate vests in them all till dissent, 2 Leon. 23, *Mutton's Case*. And so 223, an estate made to a feme covert by livery, vests in her before any agreement of the husband, Co. 1 Inst. 356 a. So of a grant of a reversion after attornment of the lessee, passeth the freehold by the deed, Co. 1 Inst. 49 a, Lit. sect. 66. In case of a lease, the lessee hath right immediately to have the tenements by force of the lease. So in the case of limitation of remainders and of devises (which though a conveyance introduced by the Statute, yet operates according to the common law), the freehold passeth to the devisee before notice or assent. I do not cite authorities, which are plentiful enough in these matters, because they that have argued for the plaintiff have in a manner agreed, that in conveyances at the common law, generally the estate passeth to the party, till he divests it by some disagreement.

"But 't is objected, that in case of surrenders, an express assent of the surrenderee is a circumstance requisite; as attornment to a grant of a reversion, livery to a feoffment, or execution by entry, in case of an exchange.

"To which I answer, that an assent is not only a circumstance, but 't is essential to all conveyances; for they are contracts, *actus contras actum*, which necessarily suppose the assent of all parties: but this is not at all to be compared with such collateral acts or circumstances, that by the positive law are made the effectual parts of a conveyance;

claimed the property as mortgagee under a deed purporting to be executed by W. Wynne, deceased. At the trial before *Garrow*, B., at the

as attornment, livery, or the like; for the assent of the party that takes, is implied in all conveyances, and this is by intendment of law, which is as strong as the expression of the party, till the contrary appears; *stabit præsumptio donec probetur in contrarium*.

"But to make this thing clear, my Lord Coke in his first Institutes, fol. 50, where he gives instances of conveyances that work without livery, or further circumstance or ceremony, puts the cases of lease and release, confirmation, devise and surrenders, amongst the rest; whereas if an express assent of the surrenderee were a circumstance to make it effectual, sure he would have mentioned it, and not marshalled it with such conveyances as I have shown before, need no such assent, nor anything further than a deed.

"The case of exchanges has been put as an instance of a conveyance at law, that doth not work immediately; but that can't be compared to the case in question, but stands upon its particular reasons; for there must be a mutual express consent, because in exchanges there must be a reciprocal grant, as appears by Littleton.

"Having, I hope, made out (and much more might have been added, but that I find it has been agreed) that conveyances work immediately upon the execution of them on the part of him that makes them, I will now endeavor to show the reasons, why they do so immediately vest the estate in the party without any express consent; and to show that these reasons do hold as strongly in case of surrenders, as of any other conveyances at law; and then consider the inconveniences and ill consequences that have been objected, would ensue, if surrenders should operate without an express consent; and to show, that the same are to be objected as to all other conveyances, and that very odd consequences and inconveniences would follow, if surrenders should be ineffectual till an express consent of the surrenderee; and then shall endeavor to answer the arguments that have been made on the other side, from the putting of cases of surrenders in the books, which are generally mentioned, to be with mutual assent, and from the manner of pleading of surrenders.

"The reasons why conveyances do divest the estate out of the grantor, before any express assent or perhaps notice of the grantee, I conceive to be these three:—

"First, because there is a strong intendment of law, that for a man to take an estate it is for his benefit, and no man can be supposed to be unwilling to that which is for his advantage. 1 Rep. 44. Where an act is done for a man's benefit an agreement is implied, till there be a disagreement. This does not hold only in conveyances, but in the gift of goods, 8 Co. 26. A grant of goods vests the property in the grantee before notice. So of things in action; a bond is sealed and delivered to a man's use, who dies before notice, his executors may bring an action. Dyer, 167. An estate made to a feme covert vests in her immediately, till the husband disagrees. So is my Lord Hobart, 204, in *Swain and Holman's Case*. Now is there not the same presumption and appearance of benefit to him in reversion in case of a surrender? Is it not a palpable advantage to him to determine the particular estate, and to reduce his estate into possession? and therefore, why should not his assent be implied, as well as in other conveyances?

"Secondly, a second reason is, because it would seem incongruous and absurd, that when a conveyance is completely executed on the grantor's part, yet notwithstanding the estate should continue in him. The words of my Lord Coke (1 Inst. 217 a) are, that it cannot stand with any reason, 'that a freehold should remain in a man against his own livery when there is a person able to take it.' There needs only a capacity to take, his will to take is intended. Why should it not seem as unreasonable, that the estate should remain in Simon Leach, against his own deed of surrender? For in case of a surrender, a deed, and sometimes words without a deed, are as effectual as a livery in case of a feoffment.

"Thirdly, the third and principal reason, as I take it, why the law will not suffer the

Summer Assizes for the County of Stafford, 1825, the principal question turned on the validity of that deed; and the following appeared to be

operation of a conveyance to be in suspense, and to expect the agreement of the party to whom 't was made, is to prevent the uncertainty of the freehold. This I take to be the great reason why a freehold cannot be granted *in futuro*, because that it would be very hard and inconvenient that a man should be driven to bring his *præcipe* or real action first against the grantor, and after he had proceeded in it a considerable time, it should abate by the transferring the freehold to a stranger, by reason of his agreement to some conveyance made before the writ brought; for otherwise there is nothing in the nature of the thing against conveying a freehold *in futuro*; for a rent *de novo* may be so granted; because that being newly created, there can be no precedent right to bring any real action for it. Palmer, 29, 30.

"Now in this case, suppose a *præcipe* had been brought against Simon Leach, this should have proceeded, and he could not have pleaded in abatement till Sir Simon Leach had assented; and after a long progress in the suit he might have pleaded, that Sir Simon Leach assented *pæis darrein continuance*, and defeated all. So that the same inconvenience, as to the bringing of real actions, holds in surrenders, as in other conveyances.

"And to show that it is not a slight matter, but what the law much considers, and is very careful to have the freehold fixed, and will never suffer it to be in abeyance, or under such uncertainty, as a stranger that demands right should not know where to fix his action.

"A multitude of cases might be cited; but I will cite only a case put 1 H. 6, 2 a, because it seems something of a singular nature, lord and villain, mortgagor and mortgagee, may be both made tenants.

"But it will be said here, that if a *præcipe* had been brought against Sir Simon Leach, might not he have pleaded his disagreement, and so abated the writ by non-tenure?

"T is true; but that inconvenience had been no more than in all other cases, a plea of non-tenure, and it must have abated immediately; for he could not have abated it by any dissent after he had answered to the writ. Whereas I have shown it in the other case, it may be after a long progress in the suit.

"Again, it's very improbable that he should dissent; whereas on the other side, an assent is the likeliest thing in the world; so the mischief to the demandant is not near so great, nor the hundredth part so probable.

"Now I come to consider those inconveniences that have been urged that would ensue, if a surrender should work immediately.

"It has been said, that a tenant for life might make such deed of surrender, and continue in possession, and suffer a recovery; and this might destroy a great many recoveries, and overthrow marriage settlements, and defeat charges and securities upon his estate after such deed of surrender.

"These, and a great many more such like mischiefs, may be instanced in surrenders; but they hold no less in any other conveyance, whereby a man may (as has been showed before) divest himself of the estate, and yet continue the possession; and in this case the assent of the surrenderee, though he doth not enter, would (as it is agreed of all hands) vest the estate in him, Hutton 95, Br. tit. Surrender 50, though he cannot have trespass before entry, and that assent might be kept as private, and let in all the mischiefs before mentioned as if no such assent were necessary.

"And this I think sufficient to answer to the inconveniences objected on that side.

"Now let us see what inconveniences and odd consequences would follow, in case a surrender could not operate till the express assent of the surrenderee, then no surrender could be to an infant at least, when under the age of discretion; for if it be a necessary circumstance, it cannot be dispensed with no more than livery or attornment. So though an infant of a year old is capable to take an estate, because for his benefit he could not take a particular estate, upon which he had a reversion immediately expectant, because

the facts of the case: Wynne was an attorney residing at Mold in Flintshire, and had acted in that character for Garnons, the lessor of

it must inure by surrender. If there be joint tenants in reversion, a surrender to one of them inures to both, 1 Inst. 192, 214 a, so there, as to one moiety, it operates without assent or notice.

"Suppose tenant for life should make livery upon a grant of his estate to him in reversion and two others, and the livery is made to the other two in the absence, and without the notice of him in reversion, should the livery not work immediately for a third part of the estate? And if it doth, it must inure as a surrender for a third part. So is Bro. tit. Surrender, and 3 Co. 76.

"If tenant for life should by lease and release convey the lands held by him for life, together with other lands to him in reversion who knows nothing of the sealing of the deed; should this pass the other lands presently, and the lands held for life not till after an express assent, because as to those lands it must work as a surrender? Plainly an express assent is not necessary. For if the grantee enters, this is sufficient.

"I come in the last place to answer those arguments that have been made from the manner of putting the case of surrenders in the book, and the form of pleading surrenders, Co. 1 Inst. 337 b.

"First, a surrender is a yielding up of the estate, which drowns by mutual agreement between them. Tenant for life, by agreement of him in reversion, surrenders to him; he hath a freehold before he enters. And so Perkins, in putting the case of a surrender, mentions an agreement; and divers other books have been cited to the same purpose.

"To all which I answer:

"No doubt but an agreement is necessary. But the question is, whether an agreement is not intended where a deed of surrender is made in the absence of him in the reversion; whether the law shall not suppose an assent, till a disagreement appears?

"Indeed, if he were present, he must agree or disagree immediately; and so 't is in all other conveyances. The cases put in Perkins, sect. 607, 608, 609, are all of surrenders made to the lessor in person; for thus he puts them: The lessee comes to the lessor, and the lessee saith to the lessor, I surrender, saith he, if the lessor doth not agree, 't is void; *Cui il ne poit surrender à luy maigre son dents*. And that is certainly so in surrenders, and all other conveyances; for a man cannot have an estate put into him in spite of his teeth.

"But I cannot find any of the books cited that come to this point, that where a deed of surrender is executed without the notice of him in reversion, that it shall pass nothing till he consents; so that it cannot be said, that there is any express authority in the case.

"Now, as to the form of pleading of a surrender it has been objected, that a surrender is always pleaded with acceptance; and many cases have been cited of such pleadings, Rastal's Entries 176, 177, Fitzh. tit. Barre 262, which are cases in actions of debt for rent, and the defendant in bar pleads, that he surrendered before the rent grew due, and shows, that the plaintiff accepted the surrender. So in waste brought, a surrender pleaded with the agreement of the plaintiff.

"These and the like cases have been very materially, and I think fully answered at the bar by my Brother Pemberton; that those actions being in disaffirmance of the surrender, and implying a disagreement, the defendant had no way to bar or avoid such disagreement, but by showing an express agreement before.

"The case of *Peto and Pemberton* in the 3 Cro. 101, that has been so often cited, is of the same sort: in a replevin the avowry was for a rent-charge; in bar of which 't is pleaded, that the plaintiff demised the land out of which the rent issued, to the avowant. The avowant replies, that he surrendered *dimissionem predict.* to which the plaintiff agreed. This is the same with pleading in bar to an action of debt for rent: but when the action is in pursuance of the surrender, then it is not pleaded.

"So is Rast. Entries 136. The lessee brought an action of covenant against the lessor, for entering upon him, and ousting of him. The defendant pleads a surrender in bar, and that without any agreement or acceptance.

the plaintiff, who resided at a distance of about three miles from Mold. Wynne's sister and niece lived in a house adjoining to his own at Mold.

"In *Fitcherbert*, tit. Debt 149, where the case is in an action of debt for rent; the defendant pleaded in bar, that he surrendered, by force of which the plaintiff became seized; there is no mention of pleading any agreement, notwithstanding that the action was in disaffirmance of the surrender.

"Therefore, as to the argument which has been drawn against the form of pleading, I say, that if an agreement be necessary to be pleaded: then, I say,

"First, that 't is answered by an implied assent, as well as an express assent. I would put the case; suppose a lessee for life should make a lease for years, reserving rent; and in debt for the rent the lessee should plead, that the plaintiff before the rent grew due surrendered to him in reversion, and he accepted it, and issue is upon the acceptance; and at the trial it is proved, that the plaintiff had executed a deed of surrender (as in this case) to him in reversion in his absence; would not this turn the proof upon the plaintiff, that he in reversion disagreed to this surrender? For surely his agreement is *prima facie* presumed, and then the rule is, *stabit presumptio donec probetur in contrarium*.

"Again, I say it appears by the cases cited that it is not always pleaded, and when pleaded 't is upon a special reason, as I have shown before, *i. e.*, to conclude the party from disagreeing; and it would be very hard to prove in reason, that an agreement (admitting an express assent to be necessary) must be pleaded; for if it were a necessary circumstance to the conveyance, why then 't is implied in pleading *sursum reddidit*; for it cannot be a surrender without it.

"In pleading of a feoffment it is enough to say *feoffavit*, for that implies livery; for it cannot be a feoffment without it.

"Now why should not *sursum reddidit* imply all necessary requisites, as well as *feoffavit*? and therefore I do not see that any great argument can be drawn from the pleading. For,

"1. It is not always to be pleaded.

"2. It cannot be made out to be necessary so to plead it; for if assent be a necessary requisite, then 't is implied by saying *sursum reddidit*, as livery is in *feoffavit*; and then to add the words of express consent is as superfluous, as to show livery after saying *feoffavit*.

"And again, if it were always necessary, it is sufficiently answered by an assent intended in law; for presumptions of law stand as strong till the contrary appears, as an express declaration of the party."

See *accord.*, *Peasey v. Tilton*, 18 N. H. 151 (1846).

In *Standing v. Bowring*, L. R. 81 Ch. D. 282 (1885), HALSBURY, LORD CHANCELLOR, said, p. 286: "If the matter were to be discussed now for the first time, I think it might well be doubted whether the assent of the donee was not a preliminary to the actual passing of the property. You certainly cannot make a man accept as a gift that which he does not desire to possess. It vests only subject to repudiation. That is a matter which was settled by authorities which were not called to our attention in the course of the argument. In *Butler and Baker's Case*, 3 Rep. 28 b, it is said: 'The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be divested.' That case was decided in the year 1590. Exactly 100 years afterwards, in *Thompson v. Leach*, 2 Vent. 198, the question again arose, and was decided by the Queen's Bench against the opinion of *Ventris, J.* But that opinion so given was reversed afterwards by the House of Lords on a writ of error, 2 Vent. 208, and that was a very strong case indeed, because the effect of the surrender was to bar a contingent remainder, which would otherwise have become vested by the birth of the son, which happened before the assent of the surrenderee. In *Siggers v. Evans*, 1855, 5 E. & B. 867, the old authorities are reviewed, and Lord Campbell formulated the principle which I have indicated above."

CORROD, L. J., said p. 288: "Now, I take the rule of law to be that where there is

On the 12th of April, 1820, about six o'clock in the evening, Wynne called at his sister's house, his niece then being the only person at home, and asked her to witness or sign some parchment. He produced the parchment, placed it on the table, signed his name, and then said, "I deliver this as my act and deed," putting his finger at the same time on the seal; the niece signed her name, and he took it away with him. The deed remained on the table until he took it away. He did not mention to his niece the contents of the deed, or the name of Mr. Garnons. The niece had no authority from Mr. Garnons to receive anything for him. It was proved by Miss Elizabeth Wynne, the sister of Wynne, that in April, 1820 (but whether before or after the execution of the deed as above mentioned did not distinctly appear), he brought her a brown paper parcel, and said, "Here, Bess, keep this: it belongs to Mr. Garnons." Nothing further passed at this time; but a few days after he came again, and asked for the parcel, and she gave it to him: he returned it back to her again on the 14th, 15th, or 16th of April, saying, "Here, put this by." When she received it the second time, it was less in bulk than before. Wynne died in August, 1820. After his funeral, she delivered this parcel to one Barker in the same state in which she received it from her brother. Barker, who was an intimate friend of Wynne, stated, that the latter in July, 1814, sent for him, and told him that he had received upwards of £26,000 upon Mr. Garnons' account; and after taking credit for sums he had paid, and placed out for Mr. Garnons, he was still indebted to him in more than £13,000. He then asked the witness, if he, as his (Wynne's) friend, would see Mr. Garnons to explain the circumstances. The witness consented, and Wynne then made a statement of his property, by which it appeared that after payment of his debts, including the £13,000, he would have a surplus for himself and family of £8,000 at the least. He desired the witness to tell Garnons that, although he could not pay him at that time, he would *take care to make him perfectly secure* for all the moneys due from him. Upon this being communicated to Garnons he desired Barker to assure Wynne, that he would not then distress him, or expose his circumstance of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, 'I will not take it.' When informed of it he may repudiate it, but it vests in him until he so repudiates it. *Siggers v. Evans*, 5 E. & B. 367, referred to by the Lord Chancellor, is a late case to that effect, in which the earlier authorities are reviewed, and one very remarkable case, *Smith v. Wheeler*, 1 Vent. 128, is quoted at p. 382, and also at greater length in *Small v. Marwood*, 9 B. & C. 300, 306, where the right of the Crown was defeated by an assignment made before that right accrued, but not communicated to the assignee until after that right had accrued. It was held that although the assignee knew nothing of the assignment, it became effectual at once, so as to defeat the title of the Crown, which accrued before the knowledge was communicated to the assignee, and therefore of course before acceptance by the assignee."

See *Mallott v. Wilson* L. R. [1908], 2 Ch. 494.

stances, but he expected that he would provide him securities for the money he, Wynne, owed him. This was communicated to Wynne, who expressed great gratitude to Garnons, and said he would take care to make him perfectly secure. After the funeral of Wynne, his will was produced, and with it was a paper in his own handwriting, containing a statement of his property, and a list of various debts secured by mortgage or bond, and among others, under the title "*mortgage*," there was stated to be a debt to Mr. Garnons for £10,000. Miss Wynne soon after delivered to the witness, Barker, a brown paper parcel sealed, but not directed. Upon this being opened, there was enclosed in it another white paper parcel, directed, in the handwriting of Wynne, "Richard Garnons, Esq." Within it was a mortgage deed (the same that was witnessed by Wynne's niece, as before stated), from Wynne to Garnons for £10,000. There was also within the white parcel, a paper folded in the form of a letter directed in the handwriting of Wynne to Mr. Garnons. That contained a statement of the account between Wynne and Garnons, and £10,000; part of the balance due from Wynne to Garnons, was stated to be secured upon Wynne's property. The mortgage deed found in the parcel was then delivered to Garnons. It was a mortgage of all Wynne's real estates. It was contended on the part of the defendant that nothing passed by the deed, inasmuch as there had been no sufficient delivery of it to the mortgagee, or to any person on his behalf, to make it valid; and, secondly, because it was fraudulent and void against the creditors of the grantor under the Statute 13 Eliz. c. 5. The learned judge overruled the objections, and the defendant then proved that Mr. Wynne, in May, 1820, had delivered to him a bond and mortgage of his real estates, to secure money due from Wynne to him; and that by his will he devised all his estates to the defendant, Knight, in trust to sell and pay his debts. It was further proved, that about the 5th of April a skin of parchment with a £12 stamp was prepared by Wynne's order, and for a few days he remained in his private room, with the door shut. A clerk entered the room and found him writing upon a parchment: he afterwards locked the door. There was no draft of the mortgage in the office, and he never mentioned it. The whole of the deed was in Wynne's own handwriting. He had three clerks, and deeds were in the usual course of business executed in the office, and witnessed by himself and his clerks. The learned judge told the jury, that the first question for their consideration was, whether the mortgage to the lessor of the plaintiff was duly executed by Wynne the deceased; but that if they thought it was originally well executed, the question for their consideration would be, whether the delivery to Mrs. Elizabeth Wynne was a good delivery; and he told them he was of opinion, that if, after it was formally executed, Mr. Wynne had delivered it to a friend of Mr. Garnons, or to his banker for his use, such delivery would have been sufficient to vest in Mr. Garnons the interest intended to be conveyed to him under it; and the question for them to decide was, whether the

delivery to Miss Wynne was, under all the circumstances of the case, a departing with the possession of the deed, and of the power and control over it, for the benefit of Mr. Garnons, and to be delivered to him either in Mr. Wynne's lifetime or after his death; or whether it was delivered to Miss Wynne merely for safe custody as the depository, and subject to his future control and disposition. If they were of opinion that it was delivered merely for the latter purpose, they should find for the defendant, otherwise for the plaintiff. A verdict having been found for the plaintiff, *Campbell* in last Michaelmas Term obtained a rule *nisi* for a new trial.

Taunton and *G. R. Cross*, at the sittings in banc after Hilary Term, showed cause.

Campbell and *Oldnall Russell*, contra.

Cur. adv. vult.

BAYLEY, J., now delivered the judgment of the court.

There were two points in this case. One, whether there was an effectual delivery of a mortgage deed, under which the lessor of the plaintiff claimed, so as to make the mortgage operate. The other, whether such mortgage was or was not void against creditors or a subsequent mortgagee. Upon the first point the facts were shortly these. In July, 1814, Mr. Wynne, an attorney, who was seised in fee of the premises in question, made a communication through a friend to the lessor of the plaintiff, who was a client, that he (Wynne) had misapplied above £10,000 of his (Garnons') money. Garnons answered, he relied and expected that Wynne would provide him securities for his money; and Wynne said he would make him perfectly secure, and he should be no loser. On the 12th of April, 1820, Wynne went to his sister's, who, with her niece, lived next door to him, and produced the mortgage in question, ready sealed. He then signed it in the presence of the niece, and used the words: "I deliver this as my act and deed." The niece, by his desire, attested the execution, and then Mr. Wynne took it away. The niece knew not what the deed was, nor was Mr. Garnons' name mentioned. In the same month of April he delivered a brown paper parcel to his sister, saying, "Here, Bess, keep this; it belongs to Mr. Garnons." He came for it again in a few days, and she gave it him; and he returned it on the 14th, 15th, or 16th of April, saying, "Here, put this by." It was then less in bulk than before, and contained the mortgage in question. Mr. Wynne died the 10th of August following, and after his death the parcel was opened, and the mortgage found. Mr. Garnons knew nothing of the mortgage until after it was so found. My Brother Garrow, who tried the cause, left two questions to the jury: one, whether the mortgage was duly executed; the other, whether the delivery to the sister was a good delivery; and he explained to them, that if the delivery was a departing with the possession, and of the power and control over the deed for the benefit of Mr. Garnons, in order that it might be delivered to him either in Mr. Wynne's lifetime, or after his death, the delivery would be good;

but if it was delivered to the sister for safe custody only for Mr. Wynne, and to be subject to his future control and disposition, it was not a good delivery, and they ought to find for the defendant. The jury found for the plaintiff. Their opinion, therefore, was, that Mr. Wynne parted with the possession and all power and control over the deed, and that the sister held it for Mr. Garnons, free from the control and disposition of the brother. It was urged upon the argument, that there was no evidence to warrant this finding, and that the conclusion which the jury drew had no premises upon which it can be supported. Is this objection, however, valid? Why did Mr. Wynne part with the possession to his sister, except to put it out of his own control? Why did he say when he delivered the first parcel, "It belongs to Mr. Garnons," if he did not mean her to understand, that it was to be held for Mr. Garnons' use? And though the sister did return it to her brother when he asked for it, would she not have been justified had she refused? Might she not have said, "You told me it belonged to Mr. Garnons, and I will part with it to no one but with his concurrence." The finding, therefore, of the jury, if this be a material point, appears to me well warranted by the evidence, and then there will be two questions upon the first point: one, whether when a deed is duly signed and sealed, and formally delivered with apt words of delivery, but is retained by the party executing it, that retention will obstruct the operation of the deed; the other, whether if delivery from such party be essential, a delivery to a third person will be sufficient, if such delivery puts the instrument out of the power and control of the party who executed it, though such third person does not pass the deed to the person who is to be benefited by it, until after the death of the party by whom it was executed. Upon the first question, whether a deed will operate as a deed though it is never parted with by the person who executed it, there are many authorities to show that it will. In *Barlow v. Heneage*, Prec. Cha. 211, George Heneage executed a deed purporting to convey an estate to trustees, that they might receive the profits, and put them out for the benefit of his two daughters, and gave bond to the same trustees conditioned to pay to them £1,000 at a certain day, in trust for his daughters; but he kept both deed and bond in his own power, and received the profits of the estate till he died: he noticed the bond by his will, and gave legacies to his daughters in full satisfaction of it, but the daughters elected to have the benefit of the deed and bond, and filed a bill in equity accordingly. It was urged, that the deed and bond being voluntary, and always kept by the father in his own hands, were to be taken as a cautionary provision only. Lord Keeper Wright said, *these were the father's deeds*, and he could not derogate from them; and the parties having agreed to set the maintenance of the daughters against the profits received by the father from the estate, he decreed upon the bond only; but that decree was, that interest should be paid upon the bond from the time when the condition made the money payable. In *Clavering v. Clavering* (Prec.

Cha. 285; 2 Vern. 478; 1 Bro. Parl. Cas. 122), Sir James Clavering settled an estate upon one son in 1684, and in 1690 made a settlement of the same estate upon another son: he never delivered out or published the settlement of 1684, but had it in his own power, and it was found after his death amongst his waste papers. See 2 Vern. 474, 475. A bill was filed under the settlement of 1690, for relief against the settlement of 1684; but Lord Keeper Wright held, the relief could not be granted, and observed, that though the settlement of 1684 was always in the custody or power of Sir James, that did not give him a power to resume the estate, and he dismissed the bill. In *Lady Hudson's Case*, cited by Lord Keeper Wright, a father, being displeased with his son, executed a deed giving his wife £100 per annum in augmentation of her jointure; he kept the settlement in his own power, and on being reconciled to his son, cancelled it. The wife found the deed after his death, and on a trial at law, the deed being proved to have been executed, was adjudged good, though cancelled, and the son having filed a bill in equity to be relieved against the deed, Lord Somers dismissed the bill. In *Naldred v. Gilham*, 1 Pr. Wms. 577, Mrs. Naldred in 1707 executed a deed, by which she covenanted to stand seised to the use of herself, remainder to a child of three years old, a nephew, in fee. She kept this deed in her possession, and afterwards burnt it and made a new settlement; a copy of this deed having been surreptitiously obtained before the deed was burnt, a bill was filed to establish this copy, and to have the second settlement delivered up; and Sir Joseph Jakyl determined, with great clearness, for the plaintiff, and granted a perpetual injunction against the defendant, who claimed under the second settlement. It is true, Lord Chancellor Parker reversed this decree; but it was not on the ground that the deed was not well executed, or that it was not binding because Mrs. Naldred had kept it in her possession, but because it was plain that she intended to keep *the estate* in her own power; that she designed that there should have been *a power of revocation in the settlement*; that she thought while she had the deed in her custody, she had also the estate at her command; that, in fact, she had been imposed upon, by the deed's being made an *absolute* conveyance, which was unreasonable, when it ought to have had a power of revocation, and because the plaintiff, if he had any title, had a title *at law*, and had, therefore, no business in a court of equity. Lord Parker's decision, therefore, is consistent with the position that a deed, *in general*, may be valid, though it remains under the control of the party who executes it, not at variance with it; and so it is clearly considered in *Boughton v. Boughton*, 1 Atkyns, 625. In that case, a voluntary deed had been made, without power of revocation, and the maker kept it by him. Lord Hardwicke considered it as valid, and acted upon it; and he distinguished it from *Naldred v. Gilham*, which he said was not applicable to every case, but depended upon particular circumstances; and he described Lord Macclesfield as having stated, as the ground of his decree, that he

would not establish a copy surreptitiously obtained, but would leave the party to his remedy at law, and that the keeping the deed (of which there were two parts) implied an intention of revoking (or rather of reserving a power to revoke). Upon these authorities, it seems to me, that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately, that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential. I do not rely on *Doe v. Roberts*, 2 Barn. & A. 367, because there the brother who executed the deed, though he retained the title deeds, parted with the deed which he executed.

But if this point were doubtful, can there be any question but that delivery to a third person, for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit (11 East, 623, *per* Lord Ellenborough); and there is the strongest ground here for presuming Mr. Garnons' assent, because of his declaration that he relied and expected Mr. Wynne would provide him security for his money, and Wynne had given an answer importing that he would. Sheppard, who is particularly strict in requiring that the deed should pass from the possession of the grantor (and more strict than the cases I have stated imply to be necessary), lays it down that delivery to the grantee will be sufficient, or delivery to any one he has authorized to receive it, or delivery to a stranger *for his use and on his behalf* (Shep. 57). And 2 Roll. Abr. (K.) 24, pl. 7; *Taw v. Bury*, Dyer, 167 b; 1 Anders. 4; and *Alford v. Lea*, 2 Leon. 111; Cro. Eliz. 54; and 8 Co. 27, are clear authorities, that, on a delivery to a stranger for the use and on the behalf of the grantee, the deed will operate *instantly*, and its operation will not be postponed till it is delivered over to or accepted by the grantee. The passage in Rolle's Abridgment is this: "If a man make an obligation to I., and deliver it to B., if I. get the obligation, he shall have action upon it, for it shall be intended that B. took the deed for him as his servant (3 H. 6, 27)." The point is put *arguendo* by Paston, Serjt., in 3 H. 6, who adds, "for a servant may do what is for his master's advantage, what is to his disadvantage not." In *Taw v. Bury* an executor sued upon a bond: the defendant pleaded, that he caused the bond to be written and sealed, and delivered it to Calmady to deliver to the testator as defendant's deed; that Calmady offered to deliver it to testator as defendant's deed, and the testator refused to accept it as such; wherefore Calmady left it with testator as a schedule, and not as defendant's deed, and so *non est factum*. On demurrer on this and another ground, Sir Henry Brown and Dyer, Justices, held that, first by the delivery of it to Calmady, without speaking of it as the defendant's deed, the deed was good, and was in law the deed of defendant

before any delivery over to the testator, and then testator's refusal could not undo it as defendant's deed from the beginning, and they gave judgment for the plaintiff, very much against the opinion of the Chief Justice, Sir Anthony Brown; but others of the King's Bench, says Dyer, agreed to that judgment. It was afterwards reversed, however, for a discontinuance in the pleadings. Sir A. Brown's doubt might possibly be grounded on this, that the delivery to Calmady was conditional, if the testator would accept it; and if so, it would not invalidate the position, which alone is material here, that an unconditional delivery to a stranger for the benefit of the grantee will inure immediately to the benefit of the grantee, and will make the deed a perfect deed, without any concurrence by the grantee. And this is further proved by *Alford v. Lea*, 2 Leon. 110; Cro. Eliz. 54. That was debt upon an arbitration bond; the award directed, that before the feast of Saint Peter both parties should release to each other all actions. Defendant executed a release on the eve of the feast, and delivered it to Prim to the use of the plaintiff, but the plaintiff did not know of it until after the feast, and then he disagreed to it, and whether this was a performance of the condition was the question. It was urged that it was not, for the release took no effect till agreement of the releasee. It was answered, it was immediately a release, and defendant could not plead *non est factum*, or countermand it, and plaintiff might agree to it when he pleased. And it was adjudged to be a good performance of the condition, no place being appointed for delivering it, and the defendant might not be able to find the plaintiff, and they relied on *Taw's Case*. This, therefore, was a confirmation, at a distance of twenty-eight years, of *Taw v. Bury*; and at a still later period (38 Eliz.), it was again confirmed in the great case of *Butler v. Baker*, 3 Co. 26 b. Lord Coke explains this point very satisfactorily. "If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently. But if C. offer it to B., there B. may refuse it *in pais*, and thereby the obligation will lose its force (but, perhaps, in such case, A. in an action brought on this obligation cannot plead *non est factum*, because it was once his deed); and therewith agrees Hil. 1 Eliz., *Taw's Case*, s. p. Bro. Ab. Donee, pl. 29; 8 Vin. 488. The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be divested, and such disagreement need not be in a court of record. Note, reader, by this resolution you will not be led into error by certain opinions delivered by the way and without premeditation, in 7 Ed. 4, 7, &c., and other books *obiter*." Upon these authorities we are of opinion that the delivery of this deed by Wynne, and putting it into the possession of his sister, made it a good and valid deed at least from the time it was put into the sister's possession.

The remaining question then is this, whether this deed is void as

against creditors under the 13 Eliz. c. 5, or as against defendant as a purchaser under 27 Eliz. c. 4? As to creditors, there was no proof of outstanding debts at the time of the trial, nor any proof of there being any creditor except the defendant, and he may be considered in the double character of creditor and purchaser. The facts in evidence as to him are merely these: that in May or June, 1820, Mr. Wynne delivered to his son a bond and mortgage for defendant and title deeds, and the mortgage and title deeds related to the same premises as Mr. Garnons' mortgage. What was the nature of the defendant's debt did not appear, or what was the consideration for the bond and mortgage. Whether any money was advanced when such bond and mortgage was given, or whether it was for a pre-existing debt, whether it was obtained by pressure from the defendant, or given voluntarily and of his own motion by Mr. Wynne, and whether the defendant knew of it or not, are points upon which there was no proof, and under these circumstances we cannot say the defendant made out a case to entitle him to treat Mr. Garnons' deed as void under either of the Statutes of Elizabeth. Should he be able hereafter to show that his mortgage is entitled to a preference, the present verdict will be no bar to his claim. For these reasons we are of opinion that the rule for a new trial must be discharged.

Rule discharged.¹

¹ See *Xenos v. Wickham*, 13 C. B. N. S. 381; 14 C. B. N. S. 435; L. R. 2 H. L. 296.

"Then, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as a bailee for the assured, the question of law arises, whether the policy could in law be operative until the company parted with the physical possession of the deed.

"I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: 'I deliver this as my deed;' but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it. In *Butler and Baker's Case*, 3 Co. Rep. 26, it is said: 'If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently; but if C. offers it to B., there B. may refuse it *in pais*, and thereby the obligation will lose its force.' I cannot perceive how it can be said that the delivery of the policy to the clerks of the defendant, to keep till the assured sent for it, and then to hand it to their messenger, was not a delivery to the defendant to the use of the assured. There is neither authority nor principle for qualifying the statement in *Butler and Baker's Case*, by saying that C. must not be a servant of A., though, of course, that is very material in determining the question whether it was 'delivered to C. to B.'s use,' which I consider it to be, in other words, whether it was shown that it was intended to be finally executed as binding the obligor at once, and to be thenceforth the property of B."—*Per BLACKBURN, J.*, L. R. 2 H. L. 312 (1867).

See *Linton v. Brown*, 20 Fed. R. 455 (1884).

23

EXTON v. SCOTT.

CHANCERY. 1833.

[Reported 6 Sim. 31.]

L. HAMPSON, a banker and solicitor, was, under his marriage settlement, dated in 1786, tenant for life of certain estates in Bedfordshire, with remainder to his daughters in fee; and the trustees of the settlement were empowered, with the consent of the tenant for life, to sell the estates and lay out the purchase-money in the purchase of other estates to be settled to the same uses; and, in the mean time, the purchase-money was to be invested in Government or real securities. In 1809, 1810, and 1812, Edward Hampson, the brother of L. Hampson, and the surviving trustee of the settlement, at the request of L. Hampson, sold certain parts of the settled estates, and the purchase-moneys were paid into L. Hampson's bank, to an account intituled, "Messrs. L. & E. Hampson, Trust Money." The moneys so paid in, were afterwards invested in the purchase of Navy five per cents. in the name of L. Hampson alone, and, between January and August in 1812, he sold out part of the stock, and in December, 1814, he sold out the remainder, amounting to £5,000.

In July, 1811, and December, 1812, L. Hampson's two daughters married, and Sir John Filmer and Richard Gilpin were the trustees of their settlements.

By an indenture, dated the 18th of December, 1812, and expressed to be made between L. Hampson of the one part, and Sir John Filmer and Richard Gilpin (who were described as trustees named in the settlements made previous to and upon the marriages of the two daughters of L. Hampson, by Frances, his late wife, deceased) of the other part; after reciting that the sum of £5,000, the net money arising from the sale of the part of the settled estates in the County of Bedford comprised in the settlement made upon the marriage of L. Hampson, with Frances, his late wife, was paid to and received by Hampson, and was then in his hands, as he thereby admitted and acknowledged, and that Hampson, previous to the marriages of his daughters, *undertook and agreed to execute a mortgage, to Filmer and Gilpin, of the messuages, lands, and hereditaments thereafter mentioned and described, for securing the payment to them of the said sum of £5,000 upon the trusts and for the purposes of the settlements made previous to the marriages of his said daughters: it was witnessed that, in consideration of the premises, and for better securing the repayment of the £5,000 to Filmer and Gilpin upon the trusts and for the purposes aforesaid, Hampson demised to them, all his messuages, lands, hereditaments, and real estates whatsoever, situate in the parishes of Luton and Caddington, in the County of Bedford, then in the possession or occupation of him and his tenants, for the term of 500 years, subject to redemption on payment by Hampson, to Filmer and Gilpin, of the sum of £5,000,*

with lawful interest for the same *from thenceforth*, upon the trusts and for the purposes aforesaid; and Hampson covenanted with Filmer and Gilpin, to pay to them the £5,000 and interest accordingly: and, by a bond of even date, he became bound to them in £10,000, conditioned for payment of the £5,000 with lawful interest, on the 18th of July then next.

In March, 1824, Hampson died insolvent and intestate; and a suit was shortly afterwards instituted, by two of his creditors on behalf of themselves and his other creditors, to have his estate applied in payment of his debts. The usual decree having been made, Sir John Filmer and Richard Gilpin, claimed, before the Master, to be paid the £5,000 secured by the bond and mortgage, as a debt due from the testator at his decease.

Sir J. Filmer made an affidavit in support of the claim, stating that Hampson was, at his death, indebted to him and Gilpin in £5,000, being the net money arising from the sale of part of the estates comprised in Hampson's marriage settlement, which was paid to and received by him; in consideration whereof he agreed to execute the bond and mortgage, for securing the repayment thereof to Filmer and Gilpin as trustees of the settlements made on the marriages of his daughters, upon whom the estates would have descended if they had not been sold, and that he executed the bond and mortgage in pursuance of that agreement; and that the £5,000, with interest *from Hampson's death*, remained due from his estate.

It appeared, by the evidence in opposition to the claim, that the bond and mortgage were privately prepared by Hampson himself, and were in his own handwriting; that they were executed by him in his private office, and when no one was present except himself and the clerk who attested his execution; that, a few days after his death, they were found in an iron chest, in his bed-room, containing the title-deeds relating to the mortgaged premises and other estates, which were tied up in bundles separate from the bond and mortgage-deed; and that, before Hampson's death, the existence of those instruments was not known to the persons to whom they were executed, or to any of the persons interested under the same; and one of the witnesses, who had been a partner with Hampson in his banking business, deposed that, on the 18th of December, 1812, Hampson was indebted to certain persons in sums amounting to £3,600, which still remained unpaid, and that, on the same day, Hampson, as the witness *believed*, was insolvent.

The Master having reported that the bond and mortgage were, in his opinion, void against Hampson's creditors, Filmer and Gilpin excepted to the report.

Sir E. Sugden and *Mr. Thompson*, in support of the exceptions.

Mr. Knight and *Mr. Turner*, for the plaintiffs, in support of the report.

Mr. Rolfe and *Mr. Barber* appeared for Hampson's personal representatives.

THE VICE-CHANCELLOR [SIR LANCELOT SHADWELL]. I take it to be proved that the mortgage-deed was sealed and delivered by Mr. Hampson; and, therefore, it is good, unless it is shown either that there was fraud connected with the execution of it, or that it was intended to be delivered as an escrow: but, in the latter case, there must be circumstances to show that the deed was intended to take effect conditionally, and not absolutely.

Upon the development of all the circumstances of the transaction, there is no circumstance with respect to which this deed can be considered to have been delivered as an escrow: there is no evidence to show that it was not intended to operate, immediately, as a security for the £5,000 which Hampson had received. The law then is, *prima facie*, in favor of the exceptants.

With respect to the recital that Hampson had agreed to execute the mortgage, that recital is a mere matter of course: and, as he had received the £5,000, that circumstance would justify the security; and, consequently, that mere recital, though it was not founded in fact, would not invalidate the deed.

It appears, from the Master's report made in pursuance of the decree on the hearing of the cause, that I am not at liberty to infer that Hampson was in a state of insolvency at the time when he executed the security; for it appears that he was then indebted to the amount of £3,000 or £4,000 only. There being then nothing to show either inability to grant the security, or fraud, here, I have the fact that the deed was sealed and delivered; and then I have the authority of the law for saying that the mere retainer of the deed will not affect its validity.

Exception allowed

29

WATKINS v. NASH.

CHANCERY. 1875.

[Reported L. R. 20 Eq. 262.]

THIS was a foreclosure suit. According to the judgment of the Vice-Chancellor, the evidence in the case, which was somewhat conflicting, resulted in establishing the following facts:—

The plaintiffs, Benjamin Watkins and William Hutcheson Collins, were the trustees of the settlement executed on the marriage of Mr. John Henry Skyrme, a solicitor, practising at Ross, in the County of Hereford, under which instrument the wife took the first life interest in the settled property.

By an indenture, dated the 29th of November, 1866, the defendant, Francis Nash, conveyed to the plaintiffs, their heirs and assigns, certain freehold hereditaments in the Forest of Dean, by way of mortgage, for securing the repayment of a sum of £2,000, part of their trust fund, which the plaintiffs then advanced to Nash.

In the year 1869, Skyrme, who was Nash's solicitor, informed the plaintiffs that Nash was desirous of paying off the mortgage debt, and of taking a reconveyance to himself, and a reconveyance was accordingly prepared, and was engrossed on the indenture of mortgage.

Collins, who was a solicitor, resided at Ross, and Watkins, who was a farmer, resided nine miles from Ross, and only attended that town for business purposes.

On the 23d of December, 1869, Skyrme, in company with Watkins, called upon Collins at his office in Ross, and at Skyrme's request, and upon his representation that it would facilitate the speedy completion of the matter, Watkins then and there executed the reconveyance as an escrow conditional on the payment of the mortgage debt, and left it with Collins.

Nothing further was done in the matter until the 18th of April, 1872, when Skyrme, in company with Watkins, called on Collins, and told him that Nash, the mortgagor, was about to sell the mortgaged property, and intended to pay off the mortgage debt in the then following week, and Skyrme then requested Collins to execute the reconveyance so as to enable him (Skyrme) to take it to London to be stamped, and by making an affidavit that the matter had until then been unsettled to save the penalty payable on the non-stamping of the instrument. Collins upon this request executed the reconveyance and handed it to Skyrme, taking from him an undertaking in writing to return it in two days, which undertaking contained a statement to the effect that the deed had been executed as an escrow, and upon the faith of an undertaking that the business should be forthwith settled.

The reconveyance was returned by Skyrme to the plaintiffs a few days afterwards; the mortgage debt was, however, never paid to the plaintiffs. On the 27th of April, 1873, Skyrme died, and on the 3rd of June, 1873, the plaintiffs gave Nash notice to pay off the mortgage debt and interest. It was then discovered that Skyrme had fraudulently appropriated the money raised by Nash to pay off the mortgage debt, leaving Nash under the impression that it had been paid off, and the property reconveyed in December, 1869; and although no interest had been claimed by the plaintiffs between December, 1869, and June, 1873, this was accounted for by the fact that Skyrme had continued up to the time of his death to be the solicitor of Nash, the mortgagor; and by the fact that, being the husband of the person entitled to the first life interest, Skyrme had always been permitted by the plaintiffs, the mortgagees, to receive the interest from Nash on behalf of his wife. The written undertaking given by Skyrme to the plaintiffs upon the execution of the deed by Collins had been given up to Skyrme when he returned the reconveyance, and was not forthcoming.

The only question in the suit calling for a report was, whether, under the circumstances, the reconveyance was an escrow or not.

Mr. W. Pearson, Q. C., and *Mr. A. Thomson*, for the plaintiffs.

Mr. Dickinson, Q. C., and *Mr. Cozens-Hardy* (*Mr. J. O. Griffiths* with them), for Mr. Nash, the mortgagor.

Mr. Colt, Mr. W. L. Selfe, Mr. Morgan, Q. C., and Mr. Cookson, for subsequent encumbrancers.

SIR CHARLES HALL, V. C. It appears to me to be established by the evidence that the deed of reconveyance was executed by Watkins on the 23d of December, 1869, and that the execution of the deed on that day was intended to be an execution of an incomplete character; that is, that the parties did not mean the deed so executed to be clearly and for all purposes operative as an effectual conveyance as from that time, without more, of the legal estate in the undivided moiety which alone could pass by the execution of Watkins. The execution was, I think, intended to be only operative on certain conditions. I think it is also established by the evidence, as well written as oral, that the reconveyance was not executed by Collins until the 18th of April, 1872.

That being so, the matter is in this position: The plaintiffs had a complete legal mortgage of the property in question made to them on the 29th of December, 1866, and so matters remained until the deed was executed by Watkins on the 23d of December, 1869. Now, as to this execution operating effectually or not at law, there can be no doubt that it was intended to be what is called an escrow. But it is said that the deed thus executed could not be an escrow, because it was not delivered to a stranger; and that is, no doubt, the way in which the rule is stated in some of the text-books, — Sheppard's Touchstone, for instance; but when those authorities are examined, it will be found that it is not merely a technical question as to whether or not the deed is delivered into the hands of A. B., to be held conditionally; but when a delivery to a stranger is spoken of, what is meant is a delivery of a character negating its being a delivery to the grantee or to the party who is to have the benefit of the instrument. You cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with its preserving the character of an escrow. But if upon the whole of the transaction it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument. As regards the instrument in question, it might very well, under the circumstances, be meant and taken to be a delivery by Watkins to Collins, to be held by him for the purpose of being delivered over to the grantee when the transaction was complete. I see no difficulty whatever in that view being adopted.

Then, as regards the subsequent delivery, when the deed was executed on the 18th of April, 1872, by Collins, I see no difficulty, if necessary, in holding that, if that were a delivery to Skyrme himself, it was a delivery to him as an agent for all parties for the purpose of that delivery. And in holding that there may be delivery to a third party for the benefit of all parties, I am confirmed by the authority of *Millership v. Brookes*, 5 H. & N. 797.

The circumstances of that case are not exactly the same as those in the present, and perhaps the person to whom the instrument was delivered there was really a third person and a stranger; but I consider the

principle upon which that case proceeded was this: that the delivery was not to the grantee, or the person who was to have the benefit of the deed, but was to some one as the person who was to hold or to be considered as holding the deed in an incomplete state for the benefit of all parties. Therefore, if it be true, as it appears from Mr. Collins' cross-examination, that the delivery was to Skyrme, I should not feel that to be insuperable evidence against the memorandum, which was undoubtedly signed at the time, to the effect that the deed was to be an escrow, and was not intended to be delivered to the grantee. But I might go further, and say, if it were necessary to determine the question, that the document might be an escrow, even though there was no particular person selected who under the circumstances could be considered as being the person into whose hands it was delivered, it being clear that there was no delivery at all to the grantee; that the delivery was not intended to be a delivery to the grantee at all, and that it was intended to be an instrument incomplete as a transfer of the legal estate until the conditions prescribed had been performed.

That being so, it follows that, in my judgment, the plaintiffs retain and have the legal estate in the property, unaffected by anything which has taken place.

[His Honor then considered the other points in the case, and made the usual foreclosure decree, determining the priorities of the various encumbrancers.]¹

¹ See *C. W. & Z. R. R. Co. v. Tliff*, 18 Ohio St. 235 (1862).

In *London Freehold, etc. Co. v. Baron Suffield*, L. R. [1897] 2 Ch. (C. A.) 606, one Wynne was solicitor of the plaintiff Company and was also one of four trustees under a settlement. A mortgage by the plaintiff Company to the trustees was signed and sealed and placed in the hands of Wynne. The Company urged that the delivery was in escrow, but the court found otherwise. In disposing of this point the court said, p. 621: "We are not prepared to go so far as to say that, as Wynne was himself one of the mortgagees and a party to the deed, it could not in point of law be an escrow in his hands. Counsel for the defendants contended that the mere fact that Wynne was himself one of the mortgagees was fatal to the deed being an escrow. They contended that to be an escrow the deed must be delivered to some person not a party taking under it; in short, to a stranger. In support of this contention reliance was placed on Co. Litt. 36 a; Sheppard's Touchstone, 7th ed. pp. 58, 59; and *Whyddon's Case*, Cro. Eliz. 530. No doubt the language used in the authorities referred to and reproduced in other works on real property and conveyancing is in favour of this contention. But the language is very general, and we are not at all satisfied that the law is so rigid as to compel the Court to decide that where there are several grantees and one of them is also solicitor of the grantor and of the other grantees, and the deed is delivered to him, evidence is not admissible to shew the character in which and the terms upon which the deed was so delivered. To exclude such evidence appears to us unreasonable; and we do not think we are compelled by authority to exclude it. We hold such evidence to be admissible, and in so doing we believe we are acting in accordance with modern authorities, beginning with *Murray v. Earl of Stair*, 2 B. & C. 82, and ending with *Watkins v. Nash*, L. R. 20 Eq. 262. Upon the evidence, however, to which we have already referred, we come to the conclusion that the mortgage was executed as a complete deed."

30

WHEELWRIGHT v. WHEELWRIGHT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1807.

[Reported 2 Mass. 447.]

THE petitioners set forth that Joseph [Wheelwright] is seised in fee simple of four undivided ninth parts, and the other petitioners of two undivided ninth parts, of thirty-one acres of salt-marsh lying in Wells, in common with the said Aaron Wheelwright, and they pray that their respective parts may be set off to them in severalty.

The respondent pleads in bar that Samuel Wheelwright, grandfather of the respondent, on the 30th day of January, A. D. 1700, being seised in fee of the premises, made his last will in writing, which was afterwards duly proved, and by which he devised the premises to his son, Joseph Wheelwright, father of the respondent, in fee tail general, who entered and was seised, and from whom the premises descended to the respondent, as eldest son and heir in tail to his father, — and traverses the seisin in common with the petitioners, which they, in their replication, affirm, and tender an issue to the country, which is joined by the respondent.

Upon trial of this issue before *Thatcher, J.*, October Term, A. D. 1805, the respondent produced the last will of Samuel Wheelwright, by which it was admitted, for this trial, that the premises were devised in tail to Joseph, son of the testator, and father of the respondent, and also of Joseph W., one of the petitioners, and of the husband of Mary W., another of the petitioners, and grandfather of the remaining petitioners. It was also admitted that the respondent was the heir male of Joseph, his father.

The petitioners produced, in support of their claim, two deeds of the said Joseph, bearing date May 4, 1795, one whereof purported to be a conveyance of four ninth parts to the petitioner Joseph, and the other a conveyance of two ninth parts to the remaining petitioners; and they relied on these deeds to show that they were respectively seised, in fee simple, of the several shares so conveyed. Upon producing these deeds by the petitioners, the respondent called for the evidence of their execution before they should be read. Nathaniel Wells, Esq., was produced as a witness, who testified that, in the year 1795, the petitioner Joseph requested him, by direction from his father, as he said, to write those two deeds. Having written them, on the 4th of May, 1795, the father called upon him, and signed and sealed the two deeds in presence of the witness and his brother, since deceased, and delivered them for the use of the grantees, and that he and his brother subscribed their names as witnesses. That it was the intent of the parties that the grantor should have the use of the premises during his life; and as some of the grantees were minors, and could not secure the use to him, that the deeds were delivered as *escrows*, as he expressed it, to be delivered by him to the grantees upon the death of the grantor, which

the witness has accordingly done. That the witness understood from the grantor that his intent, in executing the deeds, was to prevent the entail from depriving the grantees of the land conveyed.

The counsel for the respondent objected to the reading of the deeds to the jury upon this evidence, upon the ground that there was no proof that the same, or either of them, was duly executed and delivered by the grantor in his lifetime to either of the grantees, or to any person authorized by them, or either of them, to receive the same; and that if they had been duly executed and delivered, they were not made *bona fide*, but merely and for the express purpose of destroying the entail of said lands.

The judge overruled the objection, permitted the deeds to go in evidence, and directed the jury that they were sufficient and legal evidence to maintain the issue on the part of the petitioners. After a verdict for the petitioners, the respondent's counsel filed exceptions to the above opinion and direction of the judge, which were allowed and signed pursuant to the Statute, and at the last July Term of the court, the question of the validity of those exceptions came on to be argued.

Mellen, in support of the exceptions.

Wallingford, on the other side.

The Solicitor-General, Davis, in reply.

The cause was continued for advisement, and at this term the opinion of the court was delivered by

PARSONS, C. J. (who stated the history of the cause, and proceeded). The right which the father of the respondent had to convey any of the lands he held in tail must be derived from the Statute of March 8, 1792. By that Statute it is made lawful for any person of full age, seised in fee tail of any lands, by deed duly executed before two subscribing witnesses, acknowledged before the Supreme Judicial Court, Court of Common Pleas, or a justice of the peace, and registered in the records of the county where the lands are, for a good or valuable consideration, *bona fide* to convey such lands, or any part thereof, in fee simple, to any person capable of taking and holding such estate; and such deed, so made, executed, acknowledged, and registered, shall bar all estates tail in such lands, and all remainders and reversions expectant thereon.

From inspecting the deeds produced in evidence in this cause, it appears that two subscribing witnesses, to whose credibility no objection is made, have certified that they were signed, sealed, and delivered, in their presence. And it further appears that the grantor, on the same day, acknowledged that each instrument was his deed before a justice of the peace.

One objection made by the respondent is, that, admitting the deeds to have been executed in the form and manner required by the Statute in this case, yet these conveyances are not *bona fide*, being made, not for a valuable consideration, but for the purpose of depriving the heir

in tail of his inheritance. The deeds purport to be for a valuable consideration in money, and for love and affection to his issue, which is a *good* consideration. The Statute also provides that the conveyance may be on *good* consideration. It is therefore very clear that the Statute intended that the tenant in tail might bar the heir in tail, by deed conveying the land to his relatives, executed for a good although not a valuable consideration. This he might do by a common recovery; and this method by deed is substituted by the Statute in the place of that common assurance, the effect of which is founded on legal fictions. And it is certain that justice, or parental affection, will often induce parents who hold their lands in tail to make provision for the younger branches of their family out of the entail. As the Statute has made the estate tail assets for the payment of the debts of the tenant, before and after his decease, a *bona fide* conveyance was required by the Statute, to prevent alienations to defraud creditors, and not to protect the heir in tail. This objection cannot prevail.

The other objection is that, by the Statute, the conveyance should be completed, and the estate pass, in the lifetime of the tenant in tail, and that the deed should be sealed, delivered, and acknowledged, by him as his deed; that, in the case at bar, the deeds were delivered by the grantor to Judge Wells, not as his deeds, but as his writings or *escrows*, to be delivered as his deeds by the judge to the grantees on his, the grantor's, death; that they could have no effect until delivered by the judge accordingly; and, as the grantor was dead before the second delivery, they were never his deeds, but are void.

This objection seemed to deserve much consideration. The Statute certainly intended that the conveyance of the estate tail should be executed in the lifetime of the tenant; and therefore, if there be no acknowledgment of the deed by him, the defect cannot be supplied by the testimony of the subscribing witnesses after his death, as it may be in conveyances of estates not entailed. The reason is, as common recoveries must be suffered in the lifetime of the tenant in tail, and at a court holden at stated times, and the heir in tail has a chance that the tenant may, after the commencement of the suit, die before the term, so it was intended to leave him the chance of the tenant's dying before acknowledgment, which, as the Statute was first drawn, could be made only in some court of record; although, as it was amended, it may now be made before a justice of the peace. There is therefore some chance saved to him, but of much less consequence than it was before the bill was amended.

The law, so far as it relates to the nature of this objection, is very well settled. If a grantor deliver any writing as *his deed* to a third person, to be delivered over by him to the grantee, on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee; and if the grantee obtain the writing from the trustee before the event happen, it is the deed of the grantor, and he cannot avoid it by a plea of *non est factum*, whether generally or

specially pleaded. This appears from Perk. 143, 144, and from the case of *Bushell v. Pasmore*, 6 Mod. 217, 218. But if the grantor make a writing, and seal it, and deliver it to a third person, as his writing or escrow, to be by him delivered to the grantee, upon some future event, as his, the grantor's deed, — and it be delivered to the grantee accordingly, — it is not the grantor's deed until the second delivery; and if the grantee obtain the possession of it before the event happen, yet it is not the grantor's deed, and he may avoid it by pleading *non est factum*. This appears from Perk. 142, 137, 138.

It is generally true that a deed delivered as an escrow, to be delivered over as the deed of the party making it, on a future event, takes its effect from the second delivery, and shall be considered as the deed of the party from that time. Perk. 143, 144; 3 Co. 35 b, 36 a.

Whether the deeds in this case were delivered to Judge Wells as writings to be delivered over as the grantor's deeds on his death, or whether they were delivered as the deeds of the grantor to Judge Wells, in trust for the grantees, to be delivered to them on the grantor's death, is a question of fact, to be determined by the evidence. This evidence results from the testimony of Judge Wells, and from the inspection of the deeds. The deeds appear to have been signed, sealed, and *delivered*, in the presence of two subscribing witnesses, and to have been acknowledged as the deeds of the grantor before a justice of the peace. The witness swears that the grantor did then sign, seal, and deliver, them for the use of the grantees. Thus far there can be no doubt. But the witness further testifies that, because the grantor was to have the use of the premises during his life, and some of the grantees being minors, the deeds were delivered to him as escrows, to be delivered to the grantees upon the grantor's death. What the witness understood by escrow is not explained. He might consider them as escrows, because he was to have the custody of them until the grantor's death. To aid his memory, he therefore refers us to the memorandum he made, at the time, upon the wrapper of the deeds. In that memorandum they are called the two deeds of the grantor, naming him, to the grantees, naming them, to be kept until the death of the grantor, and then to be delivered to the grantees. Here they are not called the writings, or escrows, but the deeds, of the grantor. The weight of the evidence is certainly very great, if not conclusive, in favor of the deeds having been delivered by the grantor, as his deeds, and deposited with Judge Wells, in trust for the grantees. Upon this ground the deeds were very properly admitted as evidence, and the direction of the judge was correct.

But if the deeds are to be considered as delivered to Judge Wells, not as the deeds, but as the writings, of the grantor, we must not thence conclude that they are void. Although generally an escrow takes its effect from the second delivery, yet there are excepted cases, in which it takes its effect, and is considered the deed of the maker, from the first delivery. The exception is founded on necessity, *ut res*

valeat. Thus Perk. 139, 140. If a *feme sole* seal a writing, and deliver it as an escrow, to be delivered over on condition, and she afterwards marry, and the writing be then delivered over on performance of the condition, it shall be her deed from the first delivery; otherwise, her marriage would defeat it. In Brook's Reading, on the Statute of Limitations, p. 150, there is another exception. A. delivers a deed, as an escrow, to J. S., to deliver over on condition performed, before which A. becomes *non compos mentis*; the condition is then performed, and the deed delivered over; it is good, for it shall be A.'s deed from the first delivery. Another exception is in 3 Co. 35 b, 36 a. Lessor makes a lease by deed, and delivers it as an escrow, to be delivered over on condition performed, before which lessor dies, and after, it is delivered over on condition performed: the lease shall be the deed of the lessor from the first delivery. There is also a strong exception in 5 Co. 85. If a man deliver a bond as an escrow, to be delivered on condition performed, before which the obligor or obligee dies, and the condition is after performed — here there could be no second delivery, yet is it the deed of the obligor from the first delivery, although it was only inchoate; but it shall be deemed consummate by the performance of the condition.

Therefore, if the deeds in this case were delivered to Judge Wells as escrows, and by him delivered over on the death of the grantor, they must take their effect, and be considered as the deeds of the grantor, from the first delivery, he being dead at the second delivery. And the cases in 3 Co. 36 a, and 5 Co. 85, are in point. It may here be observed, that it is not to be presumed that it was the intention of the grantor to deliver these deeds as escrows, to be after delivered as his deeds, on the event of his death; when, from the nature of the event, they could not be considered as his deeds from the second delivery. The presumption is violent that he considered Judge Wells as a trustee of the grantees. But whether the deeds were delivered to him as escrows, or in trust for the grantees, — in either case the verdict must stand, and the first judgment be entered thereon, namely, that partition be made; and let a warrant issue to commissioners to make partition.¹

¹ See *accord*, *Hathaway v. Payne*, 34 N. Y. 92 (1865); *Schlicher v. Keeler*, 61 N. J. Eq. 394 (1901).

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MAYNARD v. MAYNARD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1813.

[Reported 10 Mass. 456.]

THIS was a writ of *entry sur disseisin*, brought to recover possession of a certain tract of land in Marlborough, wherein the demandant counts upon his own seisin within thirty years, and upon a disseisin by the tenants.

A trial was had upon the general issue, at the sittings in this county after the last October Term, before *Parker, J.*, who reports that the demandant's title is unquestioned, unless taken away by a certain deed, now cancelled, which purports to convey the same to his son, Abel Maynard, deceased, under whom the tenants claim to hold the same, the said Nancy being the widow, and the other tenants the children, of the said Abel.

The deed, which purports to have been made by the demandant, for the consideration of 2,000 dollars, and contains the usual covenants of warranty, was made under the following circumstances. In April, 1810, Hezekiah Maynard, the demandant, called upon Benjamin Rice, Esq., who is a subscribing witness to the execution of the deed, and the magistrate before whom it was acknowledged, and told him he wished to make some provision for his son Abel, and requested the witness to write a deed of the land, being part of the demandant's farm, which is described in the deed. This was done by the witness, who read it to the demandant, and he was satisfied with it. A few days afterwards, he called on the witness, and signed, sealed, and acknowledged the deed; and he requested the witness to take it to the register's office, and get it recorded. The witness carried it to the register accordingly, procured it to be recorded, and, in May following, received it back. The witness informed the demandant of this, who told him it was right, and requested him to keep the deed until it was called for. Abel, the son, was never present at any of these transactions, nor did it appear that he ever knew of the execution of the deed. About a year afterwards, Abel died, and, soon after he was buried, the demandant called upon the witness for the deed, which was given to him, he then saying that he supposed he had a right to do as he pleased with it; and then cut his name and seal from it. It was proved that Abel, the son, lived upon the farm with the demandant, his father, and carried it on with his labor, and supported his family upon it. It was also proved, by several witnesses, that the demandant, in conversation after the execution of the deed, considered the land as his son's property.

The judge instructed the jury that there were no facts proved in the case which, in law, could amount to a delivery of the deed to Abel; so that the conveyance was not perfect, and the demandant must recover possession. A verdict was accordingly returned for the demandant,

which the tenants moved might be set aside, and a new trial be granted.

Prescott, for the tenants.

Bigelow, for the demandant.

PER CURIAM. It is very clear that there was no delivery of this deed, so as to give it the effect of passing the estate from the demandant to his son, as whose widow and heirs the tenants claim. The act of registering a deed does not amount to a delivery of it; there not appearing any assent on the part of the son, or even any knowledge that the deed had been executed in his favor. A delivery of a deed duly executed and acknowledged, to the register of deeds, aided by a subsequent possession of the deed by the grantee, might be evidence of a delivery to him.

But the facts in the case at bar, testified by the person who acted as the scrivener and magistrate, leave no doubt of the intention of the grantor ultimately to pass this land to his son, but to keep the control over it until he should be more determined upon the subject. He may have chosen to place the deed, perfect as it was, except as to delivery, in the hands of the witness, in lieu of a devise, to operate after his decease; for nothing was wanting to its complete effect but to direct the witness to deliver it to his son after his own decease. He probably chose to consider it as revocable at all times by himself, in case of any important change in his family or estate. Whatever may have been his views, however, he retained an authority over it; and having reclaimed and cancelled it, the tenants can claim no title under it.

Whether a creditor of his son might not have taken it in satisfaction of a debt, in consequence of the credit given by putting such an apparent title upon record, and especially as the son was in actual possession of the premises, need not now be determined. We are satisfied that the title never passed out of the demandant, and that he is therefore entitled to a recovery.

*Judgment on the verdict.*¹

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JACKSON d. EAMES v. PHIPPS.

SUPREME COURT OF NEW YORK. 1815.

[Reported 12 Johns. 418.]

THIS was an action of ejectment, to recover 25 acres of land in lot No. 24, part of Scriba's patent, in Oneida County, and also 12 acres of land adjoining, called the Gore. The cause was tried at the Oneida Circuit, in June last, before *Mr. Justice Spencer*. Both parties claimed title to the parcel of 25 acres, under Joseph Phipps, who had been in

¹ See accord, *Youngs v. Guilbeau*, 8 Wall. 686 (U. S. 1865); *Barnes v. Barnes*, 161 Mass. 381 (1894); *Ten Eyck v. Whitbert*, 156 N. Y. 341, 352 (1898); *Hogadone v. Grange Mutual Fire-Insurance Co.*, 188 Mich. 339 (1903).

possession of the premises for a number of years prior to giving the mortgage hereafter mentioned. The declaration was served on the tenant in possession the 9th of May, 1814.

The plaintiff gave in evidence a mortgage of the two pieces of land, dated the 17th of March, 1809, by Joseph Phipps, to the lessor of the plaintiff, to secure the payment of 53 dollars, which was recorded in the office of the clerk of Oneida County, the 14th of April, 1809.

The defendant gave in evidence a deed with warranty from Joseph Phipps, to his brother, Aaron Phipps, the father of the defendant, for 44 acres and a half of land, which included the 25 acres, but not the 12 acres in question; this deed was dated, acknowledged, and recorded, the 27th of January, 1809.

The defendant offered to prove, by his attorney, that the tenant in possession, on the 6th of April, 1814, verbally agreed with him, to hold possession of the 12 acres under the defendant, on a promise to sell to the tenant. This evidence was objected to, but admitted by the judge. It did not appear, however, that the defendant, who resided in Massachusetts, knew of, or consented to, this attornment.

It was proved that Joseph Phipps, being in embarrassed circumstances, in the fall of the year 1808, went to his brother, Aaron Phipps, who resided at Hollistown, in Massachusetts, and agreed to give him a deed of his farm, to secure two notes of about 130 dollars, with the interest, and a small debt due to the defendant. Joseph Phipps, accordingly, returned home, and executed and acknowledged the deed of the 27th of January, 1809, and left it in the clerk's office. Neither the grantee, nor any person in his behalf, was present. Aaron Phipps, the grantee, died in the fall of 1809, never having been in this State. In February, 1810, Joseph Phipps sent the deed, enclosed in a letter, to Eli Phipps, the defendant, who, on receiving it, appeared to be surprised; but, on reading the letter, observed, that it was intended to secure the two notes which the said Joseph owed to the grantee, and which the defendant said he then held, as administrator of his father, uncanceled, and that he was disappointed in not receiving the money instead of the deed.

It appeared that Joseph Phipps continued to occupy the premises for about three years after the date of the deed to Aaron Phipps, and then delivered the whole to the defendant, who let them to the tenant in possession. The premises were proved to be worth about 700 dollars.

Joseph Phipps testified, that when he executed the deed to his brother, he informed him, by letter, of a mortgage to one Wager, for about 300 dollars, and another mortgage to the State, on part of the premises, for about 60 dollars; and it was proved that the defendant had paid off those two mortgages.

A verdict was taken for the plaintiff, subject to the opinion of the court on the above case.

N. Williams, for the plaintiff.

Sill, contra.

SPENCER, J., delivered the opinion of the court. The parties both claim title, under Joseph Phipps, to the 25 acre tract. The other tract is described as a Gore; and is included in the mortgage given by Joseph Phipps to the lessor of the plaintiff, but is not included in the deed from Joseph Phipps to Aaron Phipps. With respect to the piece called the Gore, there can be no question. The defendant defends as landlord of the premises, and his only pretence to any title to this part of the premises arises from his having succeeded to the possession under Joseph Phipps. The mortgage to the lessor of the plaintiff comprehending it, and the defendant having no title paramount to the mortgage, there exists no legal defence for this tract.

The date of the deed under which the defendant claims, being prior to the execution of the mortgage under which the plaintiff claims the premises, the former must prevail, if it be well and legally executed.

The objection to it is, that it never was delivered to the grantee, nor to any one, for his use, during his lifetime; and the facts are, that, in the fall of 1808, it was agreed, between Joseph and Aaron Phipps, that the former, who was indebted to the latter, should give him a deed of his farm, to secure the debt; that Joseph executed the deed, acknowledged and carried it to the clerk's office, for recording, on the day of its date, without the grantee, or any person on his behalf, being present, or receiving a delivery of the same; that Aaron, the grantee, died in the fall of 1809, and in February, 1810, the defendant received the said deed, as the son, and, probably, heir, of Aaron.

Under these circumstances, the deed must be considered inoperative. It is requisite, in every well-made deed, that there be a delivery of it. This delivery must be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing; or it may be by both; but by one or both of these it must be made; for, otherwise, though it be never so well sealed and written, yet is the deed of no force. It may be delivered to the party himself, to whom it is made, or to any other person, by sufficient authority from him, or it may be delivered to a stranger, for, and in behalf, and to the use of him to whom it is made, without authority; but if it be delivered to a stranger, without any such declaration, unless it be delivered as an *escrow*, it seems that it is not a sufficient delivery. 1 Shep. Touch. 57, 58; 2 Black. Com. 807; 4 Viner, 27, § 52. In *Jackson, ex dem. M'Crea v. Dunlap*, 1 Johns. Cas. 114, it was decided, that it was essential to the legal operation of a deed that the grantee assents to receive, and that there could be no delivery without an acceptance.

A delivery of a deed, which, we have seen, is essential to its existence and operation, *ex vi termini*, imports that there be a recipient. It would be absurd to hold that a thing was delivered, when there was no person to receive; and, in this case, the grantee died without any delivery to him. Without inquiring, therefore, whether the deed was fraudulent, it is enough that it was never well executed, by delivery.

Judgment for the plaintiff.

RUGGLES v. LAWSON.

SUPREME COURT OF NEW YORK. 1815.

[Reported 13 Johns. 235.]

THIS was a suit in partition, tried before his Honor the Chief Justice, at the Orange Circuit, in September, 1814.

The plaintiff, in his petition, set forth, that he was seised, in fee, as tenant in common, of an undivided moiety of the premises in question; and that Daniel Lawson and others, defendants, as heirs at law of Robert Thomson, jun., deceased, were each seised of an equal and undivided twentieth of the premises, and the widow of Robert Thomson was entitled to her dower in the one third of the said ten twentieths of the premises, of which the heirs of the said Robert Thomson were so seised. Several of the defendants put in pleas of confession, and consented to the partition. Robert Thomson and Nelson Thomson, two of the defendants, pleaded *Non tenent in simul*, and gave notice, under the plea, that they would prove, at the trial, that they were entitled, in their own right, to one half of the premises, and that they claimed title to the same, by virtue of a conveyance to them, dated the 15th of November, 1811, from their father, Robert Thomson (setting forth the deed at length).

At the trial, it was admitted that the plaintiff was seised, in fee, of an undivided moiety of the premises.

Robert and Nelson Thomson, two of the defendants, gave in evidence the deed set forth in the notice accompanying their plea. The deed was given for natural love and affection of the grantor to his two sons, and for the further consideration of one dollar, and conveyed an undivided moiety of the premises. David Mason, a witness, proved, that, in June, 1814, the grantor, being sick, took from his chest the deed in question, among other deeds to his children, which he delivered to the witness, and, at the same time, directed him, in case he should die before making his will, which he had requested the witness to draw up for him, that he, the witness, would deliver the deeds to his children, respectively; the witness, having retired, for a short time, to prepare the will of the grantor, on his return found him dead; and, about a month after his decease, the witness delivered the deeds to the grantees named therein.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case, which was submitted to the court without argument.

PER CURIAM. The only question in this case relates to the effect and operation of the deed from Robert Thomson, jun., to his two sons, Robert and Nelson. This deed was duly executed by the grantor, in his lifetime, and delivered to a third person, to be delivered to the grantees, in case the grantor should die before having made and executed his will. The grantor did die without having made any will,

and the deed was, after his death, delivered to the grantees. If this deed is to be considered as an *escrow*, the estate, under the circumstances stated in the case, passed to the grantees, upon the delivery after the death of the grantor. It is a well-settled rule with respect to an *escrow*, that if either of the parties die before the condition is performed, and, afterwards, the condition is performed, the deed is good, and will take effect from the first delivery. (Shep. Touch. 59.) It may, however, be questionable whether this deed is to be viewed as an *escrow*; the grantees had nothing to do, on their part, in order to make the deed absolute, which is usually the case where a deed is delivered as an *escrow*. The delivery here was, at all events, conditional, and to become absolute upon an event which has taken place; and, as in the case of an *escrow*, the deed will take effect from the first delivery. This principle is very fully laid down and illustrated in the cases of *Wheelwright v. Wheelwright*, and *Hatch v. Hatch*, 2 Mass. Rep. 447, and 9 Mass. Rep. 807. The grantees in this deed are, therefore, entitled to a moiety of the premises, and partition must be made accordingly.

FOSTER v. MANSFIELD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1841.

[Reported 3 Met. 412.]

THIS was a petition for partition, in which it was alleged that the petitioners were seised, in right of the wife, of several tracts of land therein described, as tenants in common with the respondent. The respondent pleaded that he was sole seised, and that the petitioners were not seised in manner and form as they had alleged. The trial was before the *Chief Justice*, who thus reported the case:—

Both parties claimed under John Mansfield, late of Danvers, deceased. Mary Foster, the female petitioner, and the respondent, were the only children and heirs of said John Mansfield. The petitioners contended that said John Mansfield, senior, died seised of the premises, intestate, and that they descended to his son and daughter in equal shares. The respondent contended that his father conveyed them to him, in his lifetime, by deed; and he gave in evidence a deed from his father to himself, bearing date April 18th, 1839, purporting, in consideration of \$1,000 paid, and of love and affection, and other good considerations, to convey the premises to his son in fee, with covenants of seisin and warranty. This deed purported to be attested by Elbridge Gerry and Joseph Shed; to be acknowledged before said Joseph Shed, as justice of the peace; and to be recorded in May, 1839.

The only question, ultimately raised, was as to the delivery of the deed, and its legal effect. There was evidence tending to show that the intestate, a man about seventy years old, and infirm, during his last sickness, after it was intimated to him by some of his friends that

he probably would not recover, sent for Dr. Shed, a physician and magistrate, and requested him to write two deeds: one to convey a certain part of his real estate, by him specially designated, to his daughter; and the residue of his real estate to his son; and that the deeds were prepared accordingly, as soon as they could be done: That after the intestate had given his instructions for the deeds, and Dr. Shed had taken minutes for the purpose of preparing them, the intestate told Dr. Shed that he wished to have the deeds executed, and that he Dr. Shed should retain them and deliver them to the respective grantees, after his death: That after the deeds were prepared, which was done immediately in the house, Dr. Shed went back with them to his bedroom, and he again said that he wanted to execute them, and when executed, he wanted Dr. Shed to keep them, and to deliver Mary her deed, and John his: That he then sat up in bed, and signed, sealed, and acknowledged them, and handed them to Dr. Shed; that immediately after, one was executed by his wife, agreeably to his request; that both were attested by Elbridge Gerry and Dr. Shed, and certificates of acknowledgment written on them by the latter, who put them into his pocket-book, and shortly after went away: That the intestate died on the same day, a short time after the execution of the deeds; and that soon after his death, Dr. Shed delivered the deeds to the son and daughter, respectively, pursuant to the request of the grantor.

The question was, whether this was a good execution and delivery of the deed to the son, to vest the property in the son in the lifetime of the father. The jury were instructed, that if at the time the grantor gave directions for making the deed, and after the deed was drawn and presented to him, but before he had signed and sealed it, he directed and intended, that from and after the execution of the deed, the same should be taken and retained by Dr. Shed, till after his death, and then be delivered to the grantee, his son, and he thereupon signed and sealed the deed, and pursuant to said intent, and without changing his purpose, delivered it to Dr. Shed to be attested and acknowledged, and retained by him without any further act of his, and it was attested, and the acknowledgment certified accordingly, and retained by Dr. Shed, pursuant to such direction and request, till after the grantor's death, and was then delivered to the grantee, it vested the estate in the grantee, from the time of the execution, and the grantor did not die seised. The jury, by consent, returned a verdict for the respondent.

Judgment to be rendered on the verdict, if the above direction was correct; otherwise, the verdict to be amended and entered as a verdict for the petitioners, and judgment for partition rendered thereon accordingly.

N. J. Lord, for the petitioners.

Ward, for the respondent.

SHAW, C. J. Whether, when a deed is executed, and not immediately delivered to the grantee, but handed to a stranger, to be delivered to the grantee at a future time, it is to be considered as the deed of the

grantor presently, or as an escrow, is often matter of some doubt; and it will generally depend rather on the words used and the purposes expressed, than upon the name which the parties give to the instrument. Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed, until the second delivery; but when thus delivered, it will take effect, by relation, from the first delivery. But this distinction is not now very material, because where the deed is delivered as an escrow, and afterwards, and before the second delivery, the grantor becomes incapable of making a deed, the deed shall be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity. *Wheelwright v. Wheelwright*, 2 Mass. 454. The cases there cited fully justify this position; and the principle is recognized in *Hatch v. Hatch*, 9 Mass. 310.

This principle governs the present case. Mansfield, the grantor, being seised of the land, executed and acknowledged a deed, and delivered it to Dr. Shed, with a request that he would deliver it to the grantee, after his, the grantor's decease; which he did. Then, by relation, the deed took effect, as at the time of the first delivery, and divested the estate of the grantor, as from that time.

It is immaterial to inquire, what would have been the effect, if the grantor had recovered from his sickness and taken back the deed. As the estate did not effectually pass till the second delivery, if that second delivery had been prevented, it would probably have been held that it was wholly inoperative. Nor is it material to inquire whether such deed would have been valid against creditors. Had the deed been executed in the most formal manner, and delivered to the son himself, in presence of witnesses, if made without valuable consideration, it could not avail against creditors.

Judgment on the verdict for the respondent.

MERRILLS v. SWIFT.

SUPREME COURT OF ERRORS OF CONNECTICUT. 1847.

[Reported 18 Conn. 257.]

THIS was a bill for the foreclosure of a mortgage.

The case stated and found was as follows: William Swift, one of the defendants, being the owner in fee of the lands described in the bill, subject to certain prior mortgages, and being also in embarrassed and failing circumstances, on the 11th day of February, 1845, in the absence and without the knowledge of the plaintiff, who then resided in

Lee, in the State of Massachusetts, applied to an attorney at law in the city of Hartford, and requested him to draw a mortgage deed of said lands to the plaintiff; which such attorney accordingly did, in conformity with the instructions given him. This deed contained the following condition: "Provided, if I shall well and truly pay to the said William Merrills, on demand, with interest, the sum of 1,500 dollars, which I am indebted to him on book, and by several notes, the exact date and amount not recollected, but amounting in the whole, together with the debt on book, to the sum of 1,500 dollars, or thereabouts, then this deed shall be void." Swift, having duly executed such deed, delivered it to said attorney, for the benefit of the plaintiff, and requested him to cause it to be recorded, and handed it to the plaintiff. The deed was accordingly duly recorded, on the 12th of February, 1845; and some time afterwards, it was received and accepted by the plaintiff.

The plaintiff had previously requested Swift to give him security for his indebtedness; but there was no agreement on the part of Swift to give the plaintiff any mortgage, prior to the execution of the deed in question.

At the time of the execution of this deed, there was pending in the Superior Court for the County of Hartford, an action at law, in favor of Lemuel Howlett, the other defendant, against Swift, for the recovery of a certain debt against him; which action, at a previous term of the court, had been referred to an auditor, who had made his report, in which he had found that Swift was indebted to Howlett in the sum of 417 dollars, 40 cents. This report, at the time of executing said deed, had not been accepted by the court, but was afterwards, on the 13th of February, 1845, accepted, and judgment was rendered in the action in favor of Howlett, for that sum, and for 84 dollars, 59 cents, costs of suit. On this judgment, Howlett instituted a suit against Swift, and caused said lands to be attached as his property, by writ of attachment, bearing date February 13th, 1845, which was duly returned and entered in the docket of the court, in which it is still pending, and the premises are still subject to the lien created thereby. This attachment was not made, until after said mortgage deed had been executed and recorded, but was made before any delivery of it, by the attorney to the plaintiff, and before the plaintiff had any knowledge that it had been executed.

It did not appear that Howlett, at the time of his attachment, had any knowledge of said mortgage, or of Swift's indebtedness to the plaintiff, except what may be implied from the record of the deed.

At the time of the execution of the deed, Swift was indebted to the plaintiff, by three promissory notes, described in the bill, one dated the 23d of April, 1827, for 429 dollars, 81 cents, payable five days after date, with interest, on which 210 dollars had been paid and indorsed; another, dated the 18th of August, 1843, for 350 dollars, payable at the Farmers and Mechanics Bank, ninety-five days after date; and one dated October 6th, 1844, for 543 dollars, 93 cents, pay-

able four months after date, at the Phoenix Bank, in Hartford; also a book account, on which there was due to the plaintiff 180 dollars, 55 cents; unless such indebtedness is to be barred, so far as Howlett is interested, by the following facts. No evidence was adduced on the trial, to show that the recovery of the sum specified in the first mentioned note, was not barred by the Statute of Limitations, except the testimony of Swift, who was called as a witness by the plaintiff, and testified that it had never been paid, and was still due. With respect to the last mentioned note, the court found, that before the sum due thereon had become payable, the plaintiff had indorsed and assigned it; but finding that Swift was unable to pay it, when it arrived at maturity, the plaintiff sent the money to him, and requested him to go to the bank where it was made payable, and pay it and take it up, and deliver it to him; which Swift accordingly did, with the money so furnished by the plaintiff.

At the time of the execution of the mortgage deed, the two first mentioned notes were in the possession of the plaintiff: but there was no evidence that the last mentioned note had been returned to the plaintiff by Swift, after its payment at the bank, until after the attachment.

The value of the mortgaged premises, over the known incumbrances thereon, amounted to 750 dollars.

The case was reserved upon the question, whether the plaintiff was entitled to any decree, and if so, to what decree, against Howlett, for the consideration and advice of this court.

Hungerford and Bulkeley, for the plaintiff.

Toucey and Goodman, for the defendant Howlett.

STORRS, J. It is, in the first place, contended by Howlett, the only defendant who appears in this case, that there was no delivery of the deed in question to the plaintiff by Swift, previous to the attachment by Howlett of the land embraced in it. It is essential to the validity of a deed that it should be delivered by the grantor, and accepted by the grantee. A deed takes effect only from its delivery; and there can be no delivery without acceptance, either express or implied. They are necessary, simultaneous and correlative acts. *Jackson d. Ten Eyck et ux. v. Richards*, 6 Cow. 617. As there can be no delivery without acceptance, a deed cannot be delivered where there is no person to receive it. *Jackson d. Eames v. Phipps*, 12 Johns. R. 421. And it must be delivered as the deed of the grantor, and not to any other intent. "A delivery of the deed is either actual, — i. e., by doing something and saying nothing — or else verbal — i. e., by saying something and doing nothing; or it may be by both. And either of these may make a good delivery and a perfect deed. But by one or both of these means it must be made; for otherwise, albeit it be never so well sealed and written, yet is the deed of no force. And though the party take it to himself, or happen to get it into his hands, yet it will do him no good, nor him that made it any hurt, until it be delivered." 1 Touchst.

57. Ow. 95. Yelv. 7. 1 Leon. 140. Therefore, a delivery of a deed, where actual and not verbal, does not consist of the mere act of handing or transmitting it either to the grantee or another person, but of that act and of the intention with which it is done; although the possession of it by the grantee may be evidence of the intent with which he received it. It must be delivered to the use of the grantee. In this case, the court finds that before said attachment, Swift executed the deed, and delivered it to a third person for the benefit of the plaintiff, and requested him to cause it to be recorded and handed to the plaintiff, which was accordingly done; although it does not appear that it was received by the plaintiff before the attachment by Howlett. It was, therefore, an absolute delivery by the grantor of the instrument as his deed to a third person for the use of the grantee. These circumstances, according to all the authorities on this subject, constituted a good delivery of the deed to the plaintiff, and immediately vested in him a title to the land conveyed by it. They all agree, that neither the presence of the grantee, nor his previous authority to a third person to receive it on his behalf, nor his subsequent express assent to it, is necessary to make the delivery of a deed valid. Where there is no such previous authority to receive it, his assent is presumed where the deed is beneficial to him, although his dissent may be shown, and the deed thereby rendered ineffectual. *Camp v. Camp*, 5 Conn. R. 291. *Jackson d. Pintard v. Bodle*, 20 Johns. R. 184. *Halsey v. Whitney*, 4 Mason, 20. But here his express assent is shown by his subsequent reception and acceptance of it. If the deed had been delivered as an escrow, a different question would be presented; but here the delivery was absolute and unconditional. It is said, in the Touchstone, vol. 1, pp. 57, 58, that "a delivery of a deed may be made to the party himself to whom it is made, or to any other, by sufficient authority from him; or it may be delivered to any stranger for and in the behalf, and to the use of him to whom it is made, without authority; but if it be delivered to a stranger, without any such declaration, intention or intimation (that is, of the use), unless it be in case where it is delivered as an escrow, it seems this is not a sufficient delivery." In the present case, there is not only no ground to claim it was delivered as an escrow, but it is found to have been absolutely delivered, and for the benefit of the grantee. We find no case on the subject where the same doctrine is not approbated; and it is expressly sanctioned in many, among which are *Belden v. Carter*, 4 Day, 66. *Wheelwright v. Wheelwright*, 2 Mass. R. 447. The fact that no time was limited in the present case for the delivery of the deed to the plaintiff, makes it stronger than those which have been cited, in which it was to be delivered over on a future event, viz., the death of the grantor; and where, notwithstanding that circumstance, it was held, that it became the deed of the grantor presently. *Hatch v. Hatch*, 9 Mass. R. 307. *Ruggles v. Lawson*, 13 Johns. R. 285. *Church v. Gilman*, 15 Wend. 656. *Buffum v. Green*, 5 N. Hamp. R. 71. *Jackson d. Eames v. Phipps*, 12 Johns.

R. 418. *Doe d. Garnons v. Knight*, 5 B. & Cres. 671. *Exton v. Scott*, 6 Sim. 31. In the cases cited by the defendant on this point, either the writing was an escrow, and delivered over before the event happened on which it was to take effect, *Sparrow v. Smith*, 5 Conn. R. 113, or, there was no delivery in fact of the writing, as the deed of the grantor, either to the grantee or to any other person for his use; and on these grounds they were held to be inoperative. 12 Johns. R. 418. 10 Mass. R. 456. *Elsie v. Metcalfe*, 1 Denio, 323. *Dunton v. Perry*, 5 Verm. R. 382. These cases are, therefore, inapplicable to the present.

It is claimed, in the next place, that the debts intended to be secured by the mortgage in question, are not described in it with sufficient certainty to render it inoperative against Howlett, who is a subsequent encumbrancer.

[The learned judge went on to consider this point, and decided in favor of the mortgage. This part of his opinion is omitted.]

The Superior Court is advised to render a decree for the plaintiff accordingly.

CHURCH, C. J., concurred in this opinion.

ELLSWORTH, J., dissented [but only on the ground that the securities were insufficiently described in the mortgage deed. His opinion is omitted.]

WAITE, J., concurred in these views.

HINMAN, J., gave no opinion, not having been present when the case was argued.¹

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HALL v. HARRIS.

SUPREME COURT OF NORTH CAROLINA. 1848.

[Reported 5 Ired. Eq. 303.]

CAUSE removed from the Court of Equity of Montgomery County, at the Spring Term, 1848.

The facts in this case are fully stated in a case between the same parties, *Hall v. Harris*, 3 Ired. Equity, 289, and so much of them as is necessary to the understanding of the decision now made is set forth in the opinion of the court here delivered.

Strange, for the plaintiff.

No counsel for the defendants.

PEARSON, J. When this case was before this court at June Term, 1844, it was decided, that an execution does not bind equitable interests and rights of redemption from its *teste*, as in ordinary cases, but from the time of "execution served;" and it was declared that the plaintiff would be entitled to a decree, provided the deed, under which he claimed, took effect before the execution, under which the defendant Harris claimed, was issued. 3 Ired. Eq. 289.

¹ See *Wilt v. Franklin*, 1 Binn. 502 (Pa. 1809); *Shirley v. Ayres*, 14 Ohio, 307 (1846); *Jones v. Swayne*, 42 N. J. L. 279 (1890); *Greene v. Conant*, 151 Mass. 223 (1890).

We are satisfied, that the view then taken of the case was correct. The rights of the parties depend upon that single question.

The execution issued on the 7th of March, 1840. The plaintiff alleges, that the deed took effect on the 2d of March, 1840. The facts are, that on the 2d of March the plaintiff and the defendant Morgan made an agreement, by which the plaintiff was to give Morgan \$725, for the land, to be paid, a part in cash, and the balance in notes and specific articles, as soon as the plaintiff was able, which he expected would be in a few days, and Morgan was to make a deed to the plaintiff, and hand it to Col. Hardy Morgan, to be by him handed to the plaintiff, when he paid the price. Accordingly on that day the plaintiff paid to Morgan a wagon and some leather, which was taken at the price of \$57.50 and Morgan signed and sealed the deed, and handed it to Col. Morgan to be handed to the plaintiff, when he paid the balance of the price. The deed was witnessed by Col. Morgan and one Sanders, and is dated on the 2d of March. Afterwards on the tenth of March, the plaintiff paid to Morgan the balance of the \$725, with the exception of \$152, for which Morgan accepted his note, and the deed was then handed to the plaintiff by Col. Morgan.

The question upon these facts is, whether the deed takes effect from the 2d or from the 10th of March? We are of opinion, that it takes effect from the 2d, at which time, according to the agreement, it was signed, sealed, and delivered to Col. Morgan, to be delivered to the plaintiff, when he should pay the price. The effect of the agreement was to give the plaintiff the equitable estate in the land, and to give Morgan a right to the price. The purpose, for which the deed was delivered to a third person, instead of being delivered directly to the plaintiff, was merely to secure the payment of the price. When that was paid, the plaintiff had a right to the deed. The purpose, for which it was put into the hands of a third person, being accomplished, the plaintiff then held it in the same manner, as he would have held it, if it had been delivered to him in the first instance. This was the intention, and we can see no good reason why the parties should not be allowed to effect their end in this way.

It is true, the plaintiff was not absolutely bound to pay the balance of the price. Perhaps, he had it in his power to avail himself of the Statute of Frauds, and it would seem from the testimony, that, at one time, he contemplated doing so, on account of some doubt as to the title; but he complied with the condition and paid the price. His rights cannot be affected by the fact, that he might have avoided it. If the vendor had died, after the delivery to the third person, and before the payment, the vendee upon making the payment, would have been entitled to the deed; and it must have taken effect from the first delivery; otherwise, it could not take effect at all. The intention was, that it should be the deed of the vendor from the time it was delivered to the third person, provided the condition was complied with. If this intention is *bona fide* and not a contrivance to interfere with the right of creditors, of which there is no allegation in this case, it must be allowed to take effect.

A distinction is taken in the old books, between a case, when a paper, being signed and sealed, is handed to a third person, with these words: "Take this paper and hand it to A. B. as *my deed* upon condition," &c., and a case where these words are used, take "*This deed* and hand it to A. B. upon condition," &c. In the latter case it takes effect presently; while in the former, it is held, in most cases, not to take effect until the second delivery. Touchstone, 58, 59.

The distinction, upon which this "diversity" is made, would seem too nice for practical purposes, to be a mere play upon words. The intention of the parties, whether one set of words be used or the other, is to make it a deed presently, but to lodge it in the hand of a third person, as a security for the performance of some act. If it was not to be a deed presently, provided the condition be afterwards performed, the maker would hold it himself, and the agency of the third person would be useless. Indeed the idea, that the third person is a *mere agent* to deliver the paper as a deed, if particular words be used, "escrow" for instance, even by the old cases, has many exceptions, and the deed is allowed, in such cases, to take effect. As if the maker dies, as in the case above put; or becomes *non compos mentis*; or, being a *feme sole*, marries; or if the vendor should create any encumbrance, as by making a lease; in all such cases, when the paper was handed to the third person to be *delivered as a deed* upon condition, &c., it is allowed to take effect from the first delivery, in order to effectuate the intention of the parties. In other words, when it can make no difference, the deed takes effect from the second delivery, but if it does make a difference, then the deed takes effect from the first delivery. This entirely yields the question. The last exception cited above, as to the relation of the deed, in cases of "escrow" to avoid a lease, takes in the case under consideration; for it is the same, whether the encumbrance, to be avoided, proceeds from the act of the party, or from the effect of an execution, as the object is to make the deed effectual and to carry out the intention. *State v. Pool*, 5 Ired. 105.

But, in truth, the distinction cannot be acted upon—it is merely verbal, and whether one set of words would be used, or the other, would be the result of mere accident. The law does not depend upon the accidental use of mere words "trusted to the slippery memory of witnesses." It depends upon the act, that a paper, *signed and sealed*, is put out of the possession of the maker. It must be confessed (and with reverence I say it), that many of the *dicta* to be found in the old books, in reference to deeds, are too "subtle and cunning" for practical use, and have either been passed over in silence, or wholly explained away.

We are satisfied from principle and from a consideration of the authorities, that when a paper is signed and sealed and handed to a third person to be handed to another upon a condition, which is afterwards complied with, the paper becomes a deed by the act of parting with the possession, and takes effect presently, without reference to the

precise words used, unless it clearly appears to be the intention, that it should not then become a deed, and this intention would be defeated by treating it as a deed from that time, as, if, no fraud being suggested, the paper is handed to the third person, before the parties have concluded the bargain, and fixed upon the terms; which cannot well be supposed ever to be the case; for in ordinary transactions, the preparation of deeds of conveyance, which is attended with trouble and expense, usually comes *after* the *agreement* to sell.

There must be a decree for the plaintiff, with costs against the defendant Harris.

PER CURIAM.

*Decree accordingly.*¹

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MITCHELL v. RYAN.

SUPREME COURT OF OHIO. 1854.

[*Reported 3 Ohio St. 377.*]

RESERVED in the District Court of Perry County.

The action is one of ejectment, and is in this court by agreement of parties, on the facts appearing in the notes of Judge Whitman taken at the trial in the Common Pleas, and the deposition of Margaret Shanon. From the judge's notes, it appeared that the plaintiff first offered a deed from Owen Shanon to Ellen Shanon, for the land in controversy. This deed, dated April 2, 1838, was left with the recorder of Perry County, April 6, 1838, and was actually recorded, April 11, 1838. It was agreed that Owen Shanon was the common source of title. The marriage of Ellen Shanon to John Mitchell, January 7, 1840, was admitted. Her death was also admitted. The possession was admitted always to have been in Owen Shanon, or the defendant Ryan. The defendant offered in evidence a deed from Owen Shanon and wife, to him, Ryan, dated July 27, 1847, recorded February 14, 1850. Owen Shanon, the grantor, testified in substance as follows: "Ellen Shanon was my daughter; at the time of the deed to her, she was in the East; she knew nothing of it; no consideration passed, and she never had any knowledge of the conveyance; she was born in 1823; a year after the execution of the deed, she came to Ohio; she was married in about two years after the conveyance; at this time I was in possession; I continued in possession until I contracted to sell to one Kinney; he took possession and made improvements; left, and gave up the contract; then Patrick Haughran went in under verbal contract with me, and made improvements; he left; I then sold to Timothy Ryan; he paid me two hundred dollars; Ryan never moved on the place; my

¹ See *Price v. Pittsburgh, Fort Wayne & Chicago R. R. Co.*, 34 Ill. 13 (1864). Cf. *Taft v. Taft*, 59 Mich. 185 (1896).

daughter lived a mile from the place after her marriage; she died last spring or fall."

It was agreed that the taxes were always paid by Shanon till the sale to Ryan.

Henry Green testified that a short time before the last term of the court, Mitchell had no knowledge of the deed to his wife; Duffy told him; this was just about the time of the death of the wife.

Owen Shanon being recalled, testified that he sent the deed by mail, from McConnellsville to Somerset, to be recorded; it came back in the same way; he kept the original deed till it was lost.

The deposition of Margaret Shanon was in substance as follows: "I am a sister of Ann Ryan, wife of the defendant, and also of Ellen Mitchell, deceased, wife of John Mitchell. Ellen lived in New York, before she came to Ohio; she was the last of father's family who came; he sent fifty dollars to bring her out; had no knowledge of her owning any land in Perry County previous to her death; I was with her off and on for two years before her death, she being sick; she had not enough of the necessaries of life; she had nothing that was nourishing, but did not complain, because she thought her husband was poor; she and Mitchell, after they left McConnellsville, lived on a farm owned by Mitchell and his father, until it was sold to P. Fagan; they then moved on to Carons' farm, where they lived about a year, and until she died; that farm had cleared land, but they lived in a small log-cabin in the woods; during that time Carons and they fell out, and she wanted to move on an eighty-acre tract adjoining father's farm; she told me that if Fagan would pay his notes, according to promise, they would buy a nice little place, if only 40 or 80 acres; I am acquainted with the place in dispute; during the time my sister lived in the neighborhood, Kinney lived on it; next, Joseph Perril, who occupied it at least during one crop; after him, was Patrick Haughran, who raised on it, I think, more than one crop; Ryan then had it; he rented it to Dawson, and afterward to Dew, who now occupies it; it had on it, at the time of my sister's death, two houses and a stable, and a considerable of the land was cleared; never heard her or John Mitchell say anything about owning it; it would have afforded a more comfortable place to live in, than that where she died; Ellen knew all about the sales and the renting of the place by father; I told her all about it; she asked me how much father got of Ryan for it; told her \$200; Ellen had no property with which to purchase land before her coming to Ohio, or previous to her marriage; William, Michael, and Mary Ann, plaintiffs in this action, were the only children Ellen left."

Hanna, for the plaintiffs.

Rich and Spencer, for the defendant.

THURMAN, C. J. The decision of this case depends upon the question whether the recorded instrument, purporting to be a deed from Owen Shanon and wife, to Ellen Shanon, was ever, in contemplation of law, delivered.

As the Statute provides that copies from the records of deeds, duly certified by the recorder, and under his official seal, "shall be received in all courts and places within this State as *prima facie* evidence of the existence of such deeds," it is very clear that the record of a deed is *prima facie* evidence of its delivery; since, without delivery it cannot exist as a deed. Swan's Stat. (new ed.) § 10. To the same effect are the authorities: *Steele v. Lowry*, 4 Ohio, 74; *Foster's Lessee v. Dugan*, 8 Ohio, 87; *Hammell v. Hammell*, 19 Ohio, 18; *Jackson v. Perkins*, 2 Wend. 317; *Gilbert v. N. Am. Ins. Co.*, 23 Wend. 46.

It is also clear that this presumption may be rebutted by proof. For the Statute makes the record *prima facie* evidence only, for the obvious reason that it may be the result of accident, mistake, or fraud. And being the act of a mere ministerial officer, there is no reason why it should not be subject to explanation. See the cases above cited, and also *Chess v. Chess*, 1 Penn. 32, and *Jackson v. Schoonmaker*, 4 Johns. 163.

It was therefore proper for the defendant to introduce such rebutting testimony; indeed, it was indispensable for him to do so, as the burden of proof that a recorded deed was not delivered rests upon the party attacking it.

He accordingly called Owen Shanon, the grantor, who testified as follows:—

"The grantee, Ellen Shanon, was my daughter; at time of deed to her in 1838, 2d April, she was in the East; she knew nothing of it; no consideration passed, and she never had any knowledge of the conveyance; she was born in 1823; she was fifteen years old when the deed was executed; she came to Ohio in a year afterward; was married in about two years after the conveyance; at this time I was in possession, and I continued in possession until I contracted to sell the land to Kinney; he took possession, made improvements, left and gave up his contract; then Patrick Haughran went in under a verbal contract with me, and made improvements; he left; I then sold it to Timothy Ryan, the defendant; he paid me \$200 agreed to; that was the consideration; Ryan never moved on to the place; Ryan agreed to sell to Duffy; the legal title is in Ryan, and he is in possession by Duffy; my daughter (Ellen) lived a mile from the place after her marriage; she died in January or February, 1852; she never had any notice of the conveyance; I sent the deed by mail from McConnellsville to Somerset to be recorded; it came back the same way; I kept the deed until it was lost."

Other testimony was given by the defendant tending to prove that the grantee, Ellen, knew of the control over the property exercised by her father, and of his several contracts in relation to it; and that she made no objection, nor asserted any claim; but the same testimony strongly tended to establish that she never had any knowledge of the conveyance; nor did her husband know of it until after her death, and after the sale to Duffy. It was also agreed that Owen Shanon paid

the taxes upon the land until he sold to Ryan. Upon this testimony, the first question for our consideration is, With what intent did Owen Shanon send the deed to the recorder to be recorded? Did he thus deliver it for the use of the grantee, and to pass the title to her immediately, or had he some other intent?

That a delivery of a deed to a stranger for the use of the grantee may be a sufficient delivery, is well settled. 1 Shep. Touch. 57, 58; 12 Johns. 421.

But it is said in the Touchstone that if such a delivery be made without a declaration of the use, it seems it is not sufficient. The reason of this is very obvious. If the deed be delivered to the grantee, the natural presumption is that it is for his use, and no words are necessary. But if it be handed to a stranger, there is no such natural presumption; and hence, unless there be something besides the mere act of delivery to evidence the intent, it is impossible to say that the grantor designed to part with the title. For the delivery may be by mistake, or for mere safe-keeping, or for some other cause wholly independent of a purpose to transfer the estate.

But while it is thus apparent that the mere act of delivery to a stranger is insufficient, it is equally clear that there is no precise form of words necessary to declare the intent. Anything that shows that the delivery is for the use of the grantee is enough. For the real question is, Does the grantor by his act mean to part with his title? And whatever satisfactorily manifests this design is as good as an explicit declaration. Now it does seem to us that when a man executes and acknowledges a deed and delivers it to the recorder, with unqualified instructions to record it, as was done in the present case, the reasonable presumption, in the absence of any rebutting circumstance, is that he means thereby to transfer his title.¹ And this presumption is powerfully strengthened when, as in the case before us, the grantee is a minor child of the grantor, and is at a great distance from him, so that the deed cannot be delivered to her in person, and when, too, the circumstances tend to show that it is a gift, and a reasonable one, for aught that appears, for the grantor to make.

It is argued, however, that there are circumstances in proof that rebut the idea that Shanon, when he caused the deed to be recorded, meant to part with his title; and we are referred to his subsequent possession of the instrument, to his subsequent control of the property and contracts to sell it, and to the failure of the grantee, or her husband, to assert any claim to the land before the commencement of this suit.

As to the last circumstance, it is explained by the fact that the grantee died without any knowledge of the deed; nor did her husband know anything about it until just before this suit was commenced. No inference, therefore, can be drawn from their silence. What weight, if any, should be given to the fact that the grantor never communicated to either of them the existence of the conveyance, is another matter.

Much stress has sometimes been laid upon the fact of the grantor's

¹ See *Robbins v. Rascos*, 120 N. C. 79 (1897).

possession of a deed after an alleged delivery of it; and it has been said that such subsequent possession is a very pregnant circumstance to show that the supposed delivery was not absolute. That this may often be the case is undeniable; but where the deed has been recorded, such subsequent possession is evidently entitled to much less consideration than where it has not. An unrecorded deed is the sole evidence of title, and it would be unsafe and altogether unusual to leave it with the grantor after its delivery. But a recorded deed is not the sole evidence. The Statute makes the record also proof, and a copy of it is admissible, even though the party offering it has the deed itself in his possession. Hence, with us, people have been proverbially careless about their deeds after they are recorded, and often, if not generally, seem to attach more importance to the record than to the original. Add to this that the grantor, Owen Shanon, was the father of the grantee, Ellen; that she was a minor, and away from home several hundred miles when the deed was recorded, and that she remained away for about a year, and it seems to us that but little, if any, importance ought to be attached to his subsequent possession of the instrument. He was her natural guardian, and there was nothing strange in his having the custody of what belonged to her, even though it was a deed in which he was the grantor.

Waiving the question, whether the subsequent acts of ownership, exercised by Owen Shanon, in respect to the land, and his failure to communicate the existence of the deed to his daughter, are admissible evidence to prove that it was not his design to transfer the title to her when he caused the instrument to be recorded, we are inclined to the opinion, after a consideration of the whole case, that the testimony rather tends to prove a change of his mind subsequent to the delivery to the recorder, than to establish that it was not then his purpose to convey the estate. If it had been his purpose when he made the delivery, to retain any control over the property, it is reasonable to suppose he would have declared such purpose to some one; if not to the recorder, at least to some member of his family, or to some friend. He was aware that by causing the deed to be recorded, he would, *prima facie*, be divested of his title, and it is not very reasonable to suppose that he would make such a *prima facie* case against himself, without taking some precaution to enable him to rebut it, if he did not mean to do what his act purported. But this is not all. He was called as a witness, and testified. When he did so, he had the strongest motives to state that he did not mean, by the execution and recording of the deed, to part with his title. For he had subsequently conveyed the land to Ryan with warranty, and if he made that conveyance wilfully and corruptly, knowing that he had no title, he committed no less than a penitentiary offence. Yet he uttered not one word to explain the intention with which he sent the deed to the recorder. Nor did the defendant venture, so far as appears, to put a question to him touching his intent. Why this silence of both witness and party? Why this

failure to prove what the interest of both required to be proved? Why this neglect to make a successful defence? It seems to us there is but one answer we are authorized to give to these questions, and that is, that the question was not asked, because the answer would have been unfavorable, and, for the same reason, there was no unasked statement by the witness. This is the ordinary presumption where a party fails to offer proof of what he ought to prove, if it exist. It is almost incredible that, in the case before us, the defendant would fail to ask, and the witness to state, whether it was the intention to convey the land, if that intention had not in fact existed. The very object for which the witness was called was to prove that the deed was never delivered, but instead of asking him directly for what purpose he caused it to be recorded, the defendant contents himself with proving circumstances, from which he asks the court to infer the purpose.

We suppose the truth to be, that the deed was sent to the recorder to be recorded in order to vest the title in the grantee, and make the property hers; but, that afterward, the grantor changed his mind, and concluded not to give it to her. And, it is altogether probable, assuming the deed to be a gift, that he supposed he had a right to revoke it. This view reconciles his conduct perfectly, without imputing to him any wrong motive at any time, and it is the only view that, upon the testimony, we feel at liberty to take.

And here I would remark, that very clear proof ought to be made, to warrant a court in holding that a man who has executed and acknowledged a deed, and caused it to be recorded, did not mean thereby to part with his title. If such deeds could be overthrown by slight testimony, a door would be open to the grossest fraud. The testimony should, therefore, do more than make a doubtful case. It should establish clearly, that the delivery for record was not for the use of the grantee.

But it is urged, that even if Owen Shanon did intend to part with the title, yet the delivery was insufficient, because it was never accepted, or assented to by the grantee; and it is said that every sufficient delivery includes such assent or acceptance, for no one can be made a grantee without his consent.

It is true, that judges have said, with more solemnity than I think the occasion warranted, that no one can have an estate thrust upon him against his will, and that, consequently, a delivery of a deed to a stranger, for the use of the grantee, is of no effect, until assented to by the latter. How much weight this argument is entitled to, may be judged of by the fact that estates are every day thrust upon people by last will and testament; and it would certainly sound somewhat novel to say that the devises were of no effect until assented to by the devisees. If a father should die testate, devising an estate to his daughter, and the latter should afterward die without a knowledge of the will, it would hardly be contended that the devise became void for want of acceptance, and that the heirs of the devisee must lose the estate.

Neither will it be denied that equitable estates are every day thrust upon people by deeds, or assignments, made in trust for their benefit, nor will it be said that such beneficiaries take nothing until they assent. Add to these the estates that are thrust upon people by the Statute of descent, and we begin to estimate the value of the argument, that a man shall not be made a property holder against his will, and that courts should be astute to shield him from such a wrong.

It is certainly true, as a general rule, that acceptance, by the grantee, is necessary to constitute a good delivery, for a man may refuse even a gift. But that such acceptance need not be manual is equally true, and it is also certain that simple assent to the conveyance, given even before its execution, is a sufficient acceptance. Thus, where a vendee had fully paid for the land and was entitled to a conveyance, and his vendor, without his knowledge, executed the deed and delivered it to a stranger, not of the vendee's appointment, for the use of the latter, it was held that the delivery was sufficient and the deed took effect immediately, although the vendee was wholly ignorant of what was done. *Church v. Gilman*, 15 Wend. 656. So, patents for the public lands are held to take effect as soon as issued, though they may never come to the grantee's hands, and were issued without any specific application for them.

But the cases go still further, and, upon the soundest reasons, hold that where a grant is plainly beneficial to the grantee, his acceptance of it is to be presumed in the absence of proof to the contrary.

It is argued, however, that this is only a rule of evidence, and that where the proofs show that the grantee has never had any knowledge of the conveyance the presumption is rebutted.

If this argument were limited to cases in which an acceptance of the grant would impose some obligation upon the grantee, I am not prepared to say that I would object to it, although the obligation might fall far short of the value of the grant. But where the grant is a pure, unqualified gift, I think the true rule is that the presumption of acceptance can be rebutted only by proof of dissent; and it matters not that the grantee never knew of the conveyance, for as his assent is presumed from its beneficial character, the presumption can be overthrown only by proof that he *did* know of and *rejected* it. If this is not so, how can a deed be made to an infant of such tender years as to be incapable of assent? Is it the law that if a father make a deed or gift to his infant child, and deliver it to the recorder to be recorded for the use of the child, and to vest the estate in it, the deed is of no effect until the child grow to years of intelligence and give its consent? May the estate, in the meantime, be taken for the subsequently contracted debts of the father, or will the Statute of Limitations begin to run in favor of a trespasser upon the idea that the title remains in the adult? Or, will the conveyance entirely fail, if either grantor or grantee die before the latter assent? I do not so understand the law. In such a case, the acceptance of the grantee is a presumption of law arising from the

beneficial nature of the grant, and not a mere presumption of an actual acceptance. And for the same reason that the law makes the presumption, it does not allow it to be disproved by anything short of actual dissent.

I am fully aware that these views may seem opposed to many decided cases, but they are fully sustained by others that stand, in our judgment, upon a more solid foundation of reason. The strictness of the ancient doctrine, in respect to the delivery of deeds, has gradually worn away until a doctrine more consistent with reason and the habits of the present generation now prevails. *Snider v. Lachenour*, 2 Ired. Eq. 360; *Ellington v. Currie*, 5 Ired. Eq. 21; *Church v. Gilman*, 15 Wend. 656; *Tate v. Tate*, 1 Dev. & Bat. Eq. 26; *Monon v. Alexander*, 2 Ired. Law, 392.

It remains to be considered whether the deed in question was of that beneficial nature to the grantee, as to give rise to the presumption of which I have spoken.

Upon its face it purports to be for a pecuniary consideration paid to the grantor. *Prima facie*, therefore, it was neither a gift nor advancement. But the proof satisfies us that the grantor never received or expected any pecuniary consideration for it. If he intended that his daughter should have the land, he intended it as a gift. I have already said that upon the testimony we feel bound to say that he did intend to convey it to her, and we must therefore consider the deed as a gift. Applying, then, the principles we have recognized, the title vested in Ellen Shanon when Owen Shanon caused the deed to be recorded. She was seised of it during her intermarriage with the lessor of the plaintiff, there was an issue of the marriage, and she died before the commencement of this suit. According to the decision in *Borland's Lessee v. Marshall*, 2 Ohio St. 308, the lessor of the plaintiff became tenant by the curtesy, even if the lands were adversely held during the coverture. It follows that the plaintiff is entitled to judgment.

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SMITH v. SOUTH ROYALTON BANK.

SUPREME COURT OF VERMONT. 1859.

[Reported 82 Vt. 341.]

BILL IN CHANCERY. From the bill, answers and testimony, it appeared that in August, 1856, Daniel Tarbell, Jr., then a director in the South Royalton Bank, a corporation organized under the general banking law of 1851, requested the orator, Spencer Smith, to execute to such bank a bond and mortgage of his home farm in Tunbridge to enable the bank, by an assignment of such bond and mortgage to the treasurer of the State, under the provisions of that law, to obtain an

increased issue of their registered bills; that Tarbell promised to pay Smith seventy dollars per annum for the use of his farm for that purpose, and also agreed to furnish him a bond from one Pierce, indemnifying him against any loss by reason of the execution of such bond and mortgage; that Smith, in reliance upon this agreement, executed a bond to the South Royalton Bank, in accordance with the provisions of the general banking law, for twenty-four hundred and eighty dollars, payable in 1865, with interest semi-annually, and the orators executed a mortgage of their home farm to secure the payment of this bond; that this bond and mortgage were not delivered by the orators to Tarbell nor to the bank, but it was expressly agreed between Tarbell and the orators that they should not have any effect nor be delivered to any one to be used for any purpose whatever until the indemnifying bond of Pierce should be furnished the orators, but that in the mean time they should be held by one Rolfe, to whom they were then handed by the orators. It was, however, at the suggestion of Tarbell and Rolfe, agreed by the orators that, for the sake of expediting the transaction, the mortgage should be recorded in the town clerk's office in Tunbridge, but that after it was so recorded Rolfe should still retain possession of the bond and mortgage, and not deliver them to the bank, nor to any person to be used in any way for banking purposes till the indemnifying bond of Pierce was furnished. Rolfe received the bond and mortgage from the orators with this express agreement, and procured the latter to be recorded. The bond and mortgage were then, without the knowledge of the orators, assigned by the bank to the State treasurer, and were taken by Rolfe, accompanied by Tarbell, to the treasurer's office, where Rolfe delivered them to Tarbell, who, without the orator's knowledge, delivered them to the defendant, Bates, the then State treasurer, and received for them from Bates Virginia stocks and registered bills of the bank to the amount of the bond, which stocks and bills were thereafter used by and for the benefit of the bank.

It appeared that all the officers of the bank except Tarbell, as well as the State treasurer, were entirely unaware of any stipulation on the part of Tarbell to furnish the orators a bond of indemnity, or that the bond and mortgage were handed by the orators to Rolfe with any restriction of his power and authority to deliver them, but that all of the parties except Tarbell and Rolfe acted in perfect good faith in the transaction.

On Tarbell's return from the State treasurer's office he sent seventy dollars to Smith to pay him for the use of his farm for banking purposes for the first year, but Smith refused to accept it until the bond of indemnity should be furnished. The orators were not aware until February, 1857, that their bond and mortgage had been passed into the treasurer's hands. Shortly after they had learned this fact a conversation took place between Spencer Smith and Tarbell, wherein the latter said he thought he could obtain for the orators an indemnifying bond from Chester Baxter, which Smith urged him to do. At the same time Tar-

bell told Smith to take the seventy dollars which had been lying subject to his order at the union store in Tunbridge since the August previous, and said that if a satisfactory indemnifying bond was not furnished within a very short time the money should be regarded merely as a loan from Tarbell to Smith, and upon this understanding the latter consented to receive it.

In April, 1857, the orators notified the State treasurer that the bond and mortgage in question had been fraudulently obtained and used, and that they should resist the payment thereof. This was the first notice that the State treasurer received of any claim of this kind on the part of the orators.

The defendant, Carpenter, in July, 1857, was appointed receiver of the South Royalton Bank by the Court of Chancery for the purpose of collecting its assets, redeeming its bills, and discharging its remaining indebtedness. It appeared that Tarbell was insolvent.

The bill set forth substantially these facts, and prayed for an injunction restraining the South Royalton Bank, the State treasurer and Carpenter, from proceeding in any way to collect the orators' bond and mortgage, and also that they might be decreed to deliver the same up to the orators.

Barrett, Chancellor, upon hearing, made a decree in accordance with the prayer of the bill, from which the defendants appealed.

Wm. Hebard and *Lucius B. Peck*, for the orators.

H. Carpenter and *P. T. Washburn*, for the defendants.

BENNETT, J. This is a case of very considerable importance, and we have endeavored to give it a careful consideration. We have no doubt, from the testimony, that the bond and mortgage in question in this case were delivered *conditionally* to Rolfe, to be delivered by him to the State treasurer, when the orator, Spencer Smith, should be indemnified from all loss and damage which should be occasioned to him by reason of the same, and not before. No precise form of words is necessary to make an instrument an *escrow*, and an *escrow* has been well defined to be the *conditional delivery* of an obligation or deed, which is to take effect upon the happening of some event consistent with the instrument, and not a condition of delivery repugnant to the contract and varying its terms. It is laid down in our elementary writers, that an *escrow* can never take effect as a deed till the performance of the condition, even though the grantee gets possession of it before such performance; and in *Hinman v. Booth*, 21 Wendell, 267, it was held that the condition must be *literally* fulfilled, and that where the condition was that the grantee was to give a bond for the support of a third person, and such bond had not been given, the deed could not take effect, although the support had been in fact furnished such third person during his life, and he had deceased. Until the condition is performed the deed is of no more force than it would have been if the grantor, after signing and sealing the instrument, had deposited it in his own desk. The delivery is a part of the execution of the instrument, and is essential to its vital-

ity; see 1 Shep. Touchstone, 59; 2 Hilliard on Real Property, 303, §§ 181 and 182.

It is not in fact seriously contested in this case, but that the bond and mortgage were delivered to Rolfe as *escrows*, and that they were delivered over to the State treasurer by Rolfe without authority, and *in fraud* of the rights of the orators, inasmuch as Pierce's bond of indemnity had never been procured, and the case is put upon the ground that the State treasurer, under the banking law of 1851, took the bond and mortgage in *good faith* for value paid, and that he has a good right to have them enforced, that the same may become assets of the bank in the hands of the receiver for the benefit of the bill holders of this insolvent institution. We are not disposed to question the fact that the bond and mortgage were received by the treasurer in *good faith* and for value, and that one of the two innocent parties must suffer, and the question now is, which it must be? In the case of an *escrow* the estate does not pass, but remains in the grantor until the condition has been performed and the deed delivered over, and if the deed be delivered over without a performance of the condition, it cannot be an operative delivery to pass the estate. In this case Rolfe was the special agent of the grantors to hold the bond and mortgage till the condition was performed, and no presumption can arise of his having a general agency, if that should be thought to be of any importance. The deed not having been delivered it was a nullity and void, or more properly speaking, *never existed*, and must be tainted with the *fraud* of Rolfe, which goes to the very existence of the instruments, into whosoever hands they may come. It is not like the cases where the *fraud is collateral*, as where the instrument has become a perfect one, and it is appropriated fraudulently to a use different from the one for which it was created. It is then the important question in the case, whether from the facts disclosed there is any good ground to hold that the grantors cannot avail themselves of the want of a delivery of the bond and mortgage?

It is said on the part of the defence that the orators ought to be bound by the delivery of the bond and mortgage by Rolfe, although he has been guilty of a gross fraud and has transcended his authority, because the orators have enabled him to mislead an innocent party, and that the *maxim* of natural justice well applies to this case with its full force, "that he who, though without any intentional fraud, has put it in the power of another person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the loss, rather than the other party who has placed confidence in him."

Though this position may seem specious, yet we think, as applied to this case, it is not sound. The authority delegated to Rolfe was to do a single act, and his agency was of the *most special kind*, requiring him only to perform a single act, strictly ministerial in its character. Mr. Smith, in his treatise on Mercantile Law, a work of great accuracy, on page 59, 2d edition, after defining a general agent, proceeds to say, "his authority cannot be limited by any private order or direction not

known to the party dealing with him. But the rule," he says, "is directly the reverse concerning a particular agent, that is, an agent employed specially in one single transaction, for it is," he adds, "the duty of the person dealing with such a one to ascertain the extent of his authority, and if he does not do it he must abide the consequences." So in Paley on Agency by Lloyd, 8d edition, 199, note, after stating the rule applicable to general agents, and the assumptions to be made that they have an unqualified authority to act in all matters within the scope of their agency, it is said, "in the case of a particular agent, that is, one employed specially in that single instance, no such assumption can be reasonably made, and it becomes the duty of the person dealing with him to ascertain by inquiry the nature and extent of his authority, and if it be departed from he must be content to abide the consequences."

This distinction, he says, will explain all the cases in the text. See also Smith's Mer. Law, 8d ed. 107, 108; *Wooden v. Burford*, 2 C. & M. 395; *Jordan v. Norton*, 4 M. & W. 155; *Sykes v. Giles*, 5 M. & W. 645.

Where one of two innocent persons must suffer from the *fraud* of a third person, the inquiry naturally arises, which gave the credit? Smith is not chargeable with holding out Rolfe as possessing larger powers than he in fact had; and the State treasurer, not having ascertained the true extent of his powers, though this may be without any personal fault in him, must, as between Smith and himself, be regarded as having trusted to Rolfe rather than Smith, or in other words, the State treasurer, or rather those in whose behalf he was acting, must sustain the loss occasioned by *the fraud* of Rolfe rather than Smith. If an agent in dealing for his principal, strictly within his authority, commits a fraud in the sale of property, the principal must answer for it, unless he chooses to repudiate the fraud and restore the dealer to his former situation. He cannot adopt the dealing and repudiate the fraud. The *maxim* in relation to which of two innocent persons shall suffer from the fraud of a third person, is not to be so extended as to make the principal responsible for the want of the general integrity of his agent, and for his acts attended with fraud which are not included within the power conferred upon him. Such an application of the maxim would break down well-settled principles, and would prevent the principal from defending upon the ground that it was the fraud of the agent, even in cases where the agent acted in a matter beyond the extent of his powers. The maxim was first applied by Lord Holt, in an action for a *deceit* in the sale of some silks by an agent who had authority to make the sale; 1 Salk. 289. In such a case the application of the maxim is well enough, but here Rolfe was a special agent to deliver the deed upon a special condition, and the fraud consisted in his doing an entire act which he had no authority to do. It might have been better, if the law had required that it should appear upon the face of a deed that it was delivered as an *escrow*, and if such had been the rule grantees might have been more secure against fraud, but as was well

said by Ch. J. Marshall, "the law is settled otherwise, and it is not to be disturbed by the court;" 4 Cranch, 222. The position that an agent with limited powers cannot bind his principal when he transcends his powers, and that the person dealing with him is bound to know the extent of his powers, is too well established to be questioned; 1 Peters, 290. The bond and mortgage then was a *nullity* in the hands of the treasurer *for the want of a delivery*, and he cannot escape this consequence by an application to the case of the maxim which is sometimes applied, as between two innocent parties. This is not like the case of *Pratt v. Holman et al.*, 16 Vt. 530. There the deed was delivered to the agent appointed by the grantee to procure it. In such a case the delivery to the agent was effective to pass the title, although it was delivered upon a condition which had not been performed; 1 Selden, 238; 8 Mass. 238. In legal effect it was a delivery to the grantee.

Besides, the court in *Pratt v. Holman* put the case upon the ground that the agent was satisfied with *the promise to pay the money*, and if not paid, an action might be had on the promise. This was clearly a case where the deed took effect from the time it was delivered to the agent.

The case at bar is one that does not fall within the *law merchant* as to negotiable paper. The general rule of the common law is that an assignee takes a chose in action, subject to all the equities that existed between the original parties. In the case of *The Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 3 Kernan, 599, the plaintiffs were *bona fide* holders of the certificates of stock for value advanced at the time, and Schuyler was, at the time the certificates were issued, president of the company, and also *transfer agent*, whose business it was, on the transfer of stock on the books in his charge, and the surrender of certificates, to issue new certificates of stock to the transferee, and the certificates in that case issued to Kyle were in the usual form, and were duly transferred by Kyle to the plaintiffs. Kyle and the transfer agent of the company were both parties to the *fraud*, and yet it was held that the railroad company could not be made liable to the bank on the ground that Schuyler was their transfer agent. The certificates not being commercial paper, the ordinary rule was applied. See also *Grant v. Norway*, 70 Com. Law, 665; *Coleman v. Riches*, 29 Eng. Law & Equity, 328; *The Schooner Freeman v. Buckingham et al.*, 18 Howard U. S. 182.

The case of *The Farmers' & Mechanics' Bank v. The Butchers' & Drovers' Bank*, 2 Smith (N. Y.) 125, where the *paying teller* had certified a bank cheque *to be good*, in violation of his duty, the drawer having no funds in bank, was decided purely upon the ground that a bank cheque was *negotiable paper*, and governed by the law merchant.

We think the orators are not precluded from urging in their defence a want of authority in Rolfe to deliver the bond and deed, by reason of their holding him out as having such authority.

The only pretence for this arises from the naked fact that the ora-

tors consented that the assignment might be made upon the papers, and the deed put on record, while Rolfe held them as *escrows*. This, it seems, was done simply to expedite the business. In *Maynard v. Maynard*, 10 Mass. 456, it was well held that the grantor's putting a deed upon record did not constitute a delivery of the deed to the grantee. No title could pass out of the grantors of course by the force of its being recorded, but still the question remains, what shall be the effect of putting such apparent title on record, so far as the rights of the treasurer are concerned, who acts as a trustee? Tarbell, who negotiated with the mortgagors for this mortgage to the bank, was at the time one of the directors in the bank, and was a party to the transaction, and privy to the conditions upon which the papers were put into Rolfe's hands, and the object of having the deed put on record while in the hands of Rolfe. Notice of these facts to Tarbell, a director, in the very transaction itself, was notice to the bank.

The mortgagors should not in this case be *estopped* from insisting upon a want of the delivery of the deed by reason of the record. To hold this would only be asserting in another form, that *fraud*, where the act is one of pretended agency, is no defence. It would subvert the settled doctrine that the assignee takes subject to all equities between the original parties. Besides, the putting the deed upon record was not by implication a representation of any other fact, and not designed to influence the treasurer to accept the deed without any valid delivery, but it was consented to to facilitate the completion of the whole business. No question can be had but what the bond and deed were a *nullity* in the hands of the bank, and both Tarbell and Rolfe were guilty of a gross fraud in passing them off to the treasurer. The bond and the mortgage then being, as between the orators and the bank, of no more force than so much blank paper, and utterly *void*, they are incapable of confirmation, so as to confer a title to the assignee of the bank. It is no doubt true that there is a radical distinction, as it respects the rights of a *bona fide* purchaser or assignee without notice, between a *void* and a *voidable* instrument. If, for instance, a voluntary and covinous deed of lands is made to a grantee, and he conveys to a *bona fide* purchaser without notice, the purchaser shall be preferred to the creditors of the fraudulent grantor. In such a case the deed is valid as between the parties, and *voidable* only by the creditors of the vendor. It may be conceded as a sound principle of law that in cases of *voidable deeds* and *obligations* the *bona fide* assignee or purchaser stands in a better situation than the participant in the fraud, but not so if the instrument was *void*. In the case of *Martin v. Miller*, 4 Term, 320, it was held that an unauthorized alteration in a bill of exchange, after acceptance, by which the time of payment was shortened, avoided the instrument, and that no action could afterwards be maintained on it, even by an innocent holder for value. The case of *Awde v. Dixon*, 5 Eng. Law & Equity, 512, seems by the court to be put upon the ground that the note never became a perfect instrument, as against the defend-

ant, inasmuch as there was no authority, express or implied, from him for a delivery of the note.

But let the principle be as it may in regard to commercial papers, no question can be made as to a *void deed*. The case of *Van Armage v. Miller*, 4 Wharton, 382, is ruled expressly on the distinction between a *void* and a *voidable* deed, and it was there held that a *bona fide* purchaser for a valuable consideration from the person holding a void deed stands in no better situation than such fraudulent holder. The distinction is fully recognized in *Price v. Yunkin*, 4 Watts, 85, and the case decided upon that distinction. So in *Arrison v. Harmsstead*, 2 Barr, 191, 195, it was held that a deed having been rendered void by an alteration, a purchaser without notice and for valuable consideration was in no better situation than the original parties. The case in the 4 Wharton, as in the case at bar, was one where there had been no valid delivery of the deed. So in the case of *Pawling v. United States*, 4 Cranch, 219, there had been no delivery of the deed. It hardly need be remarked that if a deed wants delivery, it is *void ab initio*.

Where a *bona fide* purchaser for value holds under a vendee, who holds by a *voidable* deed, though he and the creditors of the vendor have equal equities, yet the purchaser has also the legal title and shall be preferred. In the case at bar, though the bill holders of the bank represented by the treasurer and the orators have equal equities, yet as the bond and deed are *void*, the legal title remains in the orators and they should be preferred under the common rule, that where the equities are equal, the one having the legal title prevails.

It becomes necessary to see whether in this case there was a subsequent recognition of the delivery of the bond and deed by the orators, or something done by them which enabled Rolfe and Tarbell to deceive the assignee, and should exclude the orators from relief. We think, from the evidence, there is no ground to find the fact that Smith subsequently ratified the delivery of the bond and mortgage. When he found the papers had been fraudulently delivered by Rolfe, he had a right to try to extricate himself from loss. If he had accepted some other security in the place of Pierce's bond, it might have operated as a recognition of the delivery, but his willingness to take other security should have no such operation; and as to the reception of the seventy dollars, which by the contract he was to have for the use of his farm, for putting it in for banking purposes, as it was called, he accepted it, not under the original agreement, but under a new agreement, that it should be treated as money lent unless Tarbell should subsequently indemnify him against the bond and mortgage. The omission of Smith to give earlier notice to the treasurer of his defence cannot be construed into a ratification of the delivery of the papers, and though, if the treasurer had had earlier notice, he might have been enabled to make all things right with the bank, yet that should not throw the loss upon Smith. Both the treasurer and Smith no doubt supposed the bank amply safe, and there was at that time nothing to cause alarm in the

minds of either, and no sufficient reason in law or fact is shown why Smith should have been required to give earlier notice to prevent a waiver of his defence to the bond and mortgage.

We think that the treasurer cannot claim to take this case out of the ordinary rule upon the ground that he has been misled as to the extent of the authority of Rolfe, by the act of Smith. The bond and mortgage were, it is true, put into the hands of Rolfe, and by him carried to the treasurer in company with Tarbell, and though Rolfe and Tarbell passed them to the treasurer professedly in behalf of the bank, yet this was in no way the act of Smith, and it does not appear that they exhibited any authority from the bank so to do, and no inquiries were made of Rolfe as to his powers, and not only Rolfe and Tarbell acted in fraud of the rights of Smith, but the bank also are chargeable with participating in the fraud, inasmuch as notice to Tarbell, a director in the bank, is to be regarded as notice to the bank, of the terms upon which Rolfe held the possession of the papers. It may be conceded, perhaps, that this is a hard case for the bill holders, but would it not be much harder for the orators if they are to be visited with the fraud of Tarbell, of the bank, and of Rolfe, through whose wrongful conduct claim is made? No doubt fraud may be committed on an innocent purchaser, but had we not better encounter that risk rather than attempt to give effect to a *void deed*, simply on the ground that the grantors should be estopped from contesting it, for the reason that they consented that it might be recorded, before it was delivered, for an honest and laudable purpose? In the ordinary case a deed purports upon its face to be an *absolute* deed, and purports to have been signed, sealed, acknowledged and delivered, yet the law is well settled that it may be shown by parol that it was delivered as an *escrow*, and if it has also been recorded, still it may be shown to be only an *escrow*, and the fact of its having been recorded is of itself no evidence that the person who held the instrument as an *escrow* in his hands after it was recorded, held it with enlarged powers, as to his *agency*, and the principles of law applicable to a case of *special agency* must apply and govern this case.

The decree of the Chancellor is affirmed, with additional costs.

MOORE v. HAZELTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1864.

[Reported 9 Allen, 102.]

BILL IN EQUITY, alleging that in October, 1847, one Chamberlain was appointed by the Probate Court guardian of the plaintiff, then under age, and accepted and gave bonds for the discharge of his trust; that he received in cash the sum of \$6,000 belonging to the plaintiff, paid him the interest, but never any part of the principal, and continued to

act as guardian until the plaintiff became of age, and then owed him the sum of \$6,000 ; that in June, 1861, Chamberlain, as such guardian, being then insolvent and unable to pay his debts and liabilities, knowing that the plaintiff was of age, and being desirous of paying him what was due him, and intending to set apart and apply a portion of his own general assets in part payment of what was due to the plaintiff and to be his property and to be held in trust as a part of the fund which Chamberlain had originally received, belonging to the plaintiff, by proper deeds of assignment duly executed, assigned, for the purpose aforesaid, to the plaintiff five recorded mortgages of real estate and the promissory notes secured thereby, for the sum in all of about \$2,500. The assignments were referred to in the bill, and upon inspection appeared to have been "executed and delivered in presence of" an attesting witness by Chamberlain on the 1st of May, and acknowledged by him before a justice of the peace on the 3rd of June, 1861.

The bill also alleged that in January, 1863, Chamberlain applied for the benefit of the insolvent laws, and the defendant was chosen assignee, and Chamberlain's estate duly assigned to him ; that Chamberlain, having retained possession of these mortgages, notes, and assignments, in March, 1863, caused the assignments to be recorded in the registry of deeds, for the purpose and with the intent aforesaid ; that the plaintiff early in 1863, when and as soon as these facts came to his knowledge, assented to the assignments so made to him ; and he submitted that the mortgages and assignments were his property ; and alleged that Chamberlain afterwards took the mortgages and assignments from the registry, and held them with the notes in trust for the plaintiff, and never, after making the assignments, treated them as any part of his private assets, and did not deliver them as such to the defendant ; but that the defendant afterwards took and now had possession of them, claiming to hold them as part of Chamberlain's general assets, and refused to deliver them to the plaintiff. The plaintiff submitted that he was entitled to have them applied in payment of the fiduciary claim against Chamberlain, and prayed for a decree that they belonged to him as a trust fund set apart by the guardian from his general assets, that they might be subjected to the payment of his claim, and for an account, and for general relief.

The defendant, admitting the facts alleged, demurred generally to the bill for want of equity.

D. E. Ware, for the defendant.

P. C. Bacon, for the plaintiff.

GRAY, J. The relation of a guardian to his ward is not that of an ordinary trustee to his *cestui que trust* ; but the title to the property is in the ward ; the trust of the guardian consists in the control and management of the ward while under age, and of the property until he discharges himself of his duty by accounting for it according to law. If he continues in the possession and management of the property after

the ward has come of age, without settling his accounts, it is in effect a continuance of the guardianship as to the property. *Mellish v. Mellish*, 1 Sim. & Stu. 138. *Morgan v. Morgan*, 1 Atk. 489. Among the duties undertaken by a guardian on assuming his trust, as set forth in the conditions of his bond, are, "at the expiration of his trust to settle his accounts in the Probate Court, or with the ward or his legal representatives, and to pay over and deliver all the estate and effects remaining in his hands or due from him on such settlement to the person or persons lawfully entitled thereto." Rev. Sts. c. 79, § 5. Gen. Sts. c. 109, § 16. If the guardian fails or neglects to account, the ward's only remedy against him, at law or equity, is upon this bond. *Brooks v. Brooks*, 11 Cush. 20, 21. *Conant v. Kendall*, 21 Pick. 36. And the settlement of an account out of court by the ward, on coming of age, does not prevent him from afterwards, within a reasonable time, citing the guardian to render an account before the judge of probate. *Wade v. Lobdell*, 4 Cush. 510. 2 Kent, Com. (6th ed.) 229. In the case before us, although the ward was of age at the time of the execution of the assignments to him, the relation of guardianship, so far as property was concerned, still continued, because the guardian had not been discharged from his trust by accounting according to law. And his power and duty to separate the ward's property from his own, or to make good any part of it which he had lost or wasted, was the same after the ward had come of age as it had been during his minority. See *Yerger v. Jones*, 16 How. 37.

The assignments executed by Chamberlain to the plaintiff do not stand upon the footing of voluntary assignments; for the previous receipt of the ward's money and the fiduciary relation between the parties were a sufficient consideration. It appears by the original assignments (which there is nothing to contradict) that they were executed and delivered in the presence of an attesting witness in the form required by law to pass such property. As the title to the ward's estate was in him and not in the guardian, the evidence of the trust in the securities in question would properly be in the form, which was actually adopted, of an assignment to the ward himself, rather than a declaration of the trust upon which the guardian should continue to hold it for the ward's benefit. Yet so long as the guardian had not settled his accounts, but continued in the relation of guardian so far as related to property, he would naturally keep these assignments, like other property of the ward, until he should account for them in the Probate Court. His retaining possession of the instruments of assignment was therefore in perfect accordance with the nature of his trust. When an instrument of conveyance is sealed and delivered, with an intention on the part of the grantor that it should operate immediately, and there is nothing to qualify the delivery but keeping the deed in the hands of the grantor, it is a valid and effectual deed, in law and equity; and execution of the deed in the presence of an attesting witness is sufficient evidence from which to infer a delivery. *Shelton's Case*, Cro.

Eliz. 7. *Doe v. Knight*, 5 B. & C. 671; s. c. 8 D. & R. 848. *Hops v. Harman*, 16 Q. B. 751, n. *Jeffries v. Alexander*, 8 H. L. Cas. 649, 667. *Hall v. Palmer*, 3 Hare, 532. *Fletcher v. Fletcher*, 4 Hare, 79, 80. *Bunn v. Winthrop*, 1 Johns. Ch. 329. *Scrugham v. Wood*, 15 Wend. 545. Proof of the ward's assent to these assignments was therefore unnecessary to give them effect.

The assignments to the ward having been made for a valuable consideration, and completed more than a year before the institution of proceedings in insolvency, the assignor's insolvency at the time of making the assignments to the ward is immaterial, and the assignee under those proceedings has no title to these securities as against the ward.

*Demurrer overruled.*¹

COOK v. BROWN.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1857.

[Reported 34 N. H. 460.]

WRIT OF ENTRY.²

EASTMAN, J. The question which was found for the plaintiff, and upon which the verdict was rendered, was the delivery of the deed by Mrs. Brown, the defendant's husband, to Richard F. Fifield. If this deed was not delivered, the demandant was entitled to recover; and the jury, under the rulings and instructions of the court, have found that it was not.

But were the instructions of the court correct in regard to the delivery of the deed? This is the important question of the case. The court instructed the jury that if the deed was in the hands of the depository, to be delivered to the grantee, either before or after the death of the grantor, without the grantor's reserving a control over it, then there was a good delivery. But if the grantor reserved such a full control over the deed during her life, and to the last moment of her life, there was no delivery. If she always had the right to control the destination of the deed, there was not a delivery, but if she at any

¹ In *Ruckman v. Ruckman*, 32 N. J. Eq. 259 (1880), the court said, p. 260: "Was a sufficient delivery made? The answer to a question of this nature must always depend, in a great degree, upon the intention of the parties. The important question is, What do the circumstances of the transaction show the parties meant? Delivery may be effected by words without acts, or by acts without words, or by both acts and words. Whenever it appears that the contract or arrangement between the parties has been so far executed or completed that they must have understood that the grantor had divested himself of title, and that the grantee was invested with it, delivery will be considered complete, though the instrument itself still remains in the hands of the grantor." So *Conlan v. Grace*, 36 Minn. 276, 281 (1886).

² Only the opinion, and only that part of the opinion which relates to the question of delivery, is given.

time relinquished her right in favor of the grantee, there was a delivery; that the question was, whether she always, until her death, continued to have the right to recall the deed, if she pleased, and not whether she did in fact recall it. The court were requested to instruct the jury, that if the deed was to remain in the hands of the depositary during the life of the grantor, subject, however, during that time to be revoked by the grantor, and if not revoked then to be recorded, the deed might be regarded as the deed of the grantor from the time of the delivery to the depositary, if it was not subsequently revoked. These instructions the court declined to give, and gave those which we have stated. The point of difference between the two was this: The court held that in order to make the delivery good, it was essential that the grantor should part with her dominion over the deed. That the time when the grantee was to receive it was not material, whether at or before the decease of the grantor, but that the delivery to the depositary must be without the power of recall in the grantor; while the defendant contended that if the deed was in fact delivered in pursuance of the directions of the grantor, it made no difference that the grantor had reserved the right of recalling the deed at any time.

In *Shed v. Shed et al.*, 3 N. H. 482, where A. made an instrument purporting to convey to his two sons, B. and C., certain tracts of land, with a reservation of the use of the land to himself during his life, and delivered the instrument to D. to be delivered to B. and C. as his deed, after his decease, in case he should not otherwise direct; and A. died without giving any further directions — it was held, that the instrument was to be considered as the deed of A. from the first delivery, and that it might operate as a covenant by A. to stand seised of the land to his own use during life, remainder to B. and C. in fee. Richardson, C. J., in delivering the opinion, says: "In the case now before us, the writing was intended to effect a mere voluntary disposition of the land; and why the grantor might not reserve to himself a right to revoke the writing if he saw fit, does not readily occur to our minds. If he might legally deliver the writing absolutely, to take effect on his decease, we do not see why he might not deliver it conditionally, as an escrow, to take effect upon his decease, in case he did not change his mind and revoke it. Being the absolute owner of the estate, it seems to us that he had an incontestable right to deliver the instrument, absolutely or conditionally, according to his will and pleasure."

The decision in that case would appear to be in point for the defendant, but we do not find any other case in our own Reports, and but one or two in others, which go to that extent. On the other hand, there are many authorities which seem to us to establish a somewhat different rule.

In *Parker v. Dustin*, 2 Foster, 424, a grantor executed a deed and delivered it to a third person, with instructions to deliver it to the grantee upon the grantor's death. He afterwards told the grantee that

he had given him the land, and directed him to take possession of it, which the grantee did, and afterwards remained in possession; and it was held, that it was a question of fact for the jury, upon the evidence, whether the grantor deposited the deed with the third person, to be delivered at his decease, without reserving any control over it during his life; and that the deed should be considered as delivered or not, as the finding of the jury might be on the question of his intention. That is to say, if he intended to reserve a control over the deed, it was no delivery; but if he did not so intend, it was a delivery.

In *Doe v. Knight*, 5 Barn. & Cres. 671, the court told the jury that the question was for them to decide whether the delivery to the depositary was, under all the circumstances of the case, a departing with the possession of the deed and of the power and control over it for the benefit of the grantee, and to be delivered to him, either in the lifetime of the grantor or after his death; or whether it was delivered to the depositary, subject to the future control and disposition of the grantor. If for the latter purpose, they should find for the defendant. The point in that case was distinctly put; the defendant was seeking to defeat the deed, and the court held the validity of the deed to depend upon the question, whether the delivery to the depositary was or not subject to the future control of the grantor.

In *Commercial Bank v. Reckless*, 1 Halstead's Ch. 430, it was held that, to constitute the delivery of a deed, the grantor must part, not only with the possession but with the control of it, and deprive himself of the right to recall it.

In *Baldwin v. Maultsby*, 5 Iredell, 505, it was held that where there has been no delivery in the lifetime of the grantor, a delivery after his death, though at his request, is void.

In *Maynard v. Maynard*, 10 Mass. 456, the court, in speaking of the deed which was in controversy in that case, and of the grantor, say: "He probably chose to consider it as revocable at all times by himself, in case of any important change in his family or estate. Whatever may have been his views, however, he retained an authority over it." It is the retaining of the authority over it that shows the delivery to be incomplete. *Jackson v. Phipps*, 12 Johns. 421; *Jackson v. Dunlap*, 1 Johns. Cas. 114; 1 Devereux Eq. 14; C. W. Dudley's Eq. 14; *Hooper v. Ramsbottom*, 6 Taunton, 12; *Habergham v. Vincent*, 2 Ves. Jr. 231.

All of these authorities differ essentially from that of *Shed v. Shed*, and it appears to us that they are founded upon sounder principles.

The delivery of a deed is either absolute or conditional; absolute when it is to the grantee himself or to some person for him; when the grantor parts with all control over it, and has no power to revoke or recall it; conditional, when the delivery is to a third person, to be kept by him until some conditions are to be performed by the grantee. When the delivery is absolute, the estate passes at once to the grantee; but when conditional, the estate remains in the grantor until the condi-

tion is performed and the deed delivered over to the grantee. Strictly speaking, a conditional deed is not a deed, but an *escrow*, a mere writing, the effect of which is to depend upon the performance of the conditions by the grantee. If they are performed it becomes a deed, otherwise it is a mere nullity. Co. Lit. 36; Cruise, title 32, ch. 2; 2 Black. Com. 307; 4 Kent's Com. 454; *Jackson v. Cullin*, 2 Johns. 248; *Carr v. Hoate*, 5 Mason, 60; Shep. Touch. 57, 58.

By fiction of law an *escrow* is sometimes made to take effect from the first delivery. The relation back to the first delivery, however, is allowed only in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery. 4 Kent's Com. 454; Perkins on Conveyancing, § 138; 3 Coke, 30; 3 Black. Com. 43; *Frost v. Bechman*, 1 Johns. Ch. 297; 5 Co. 84 b.

A deed which is put into the hands of a third person, to be delivered to the grantee on the happening of some future event, but where no conditions are to be performed, is not an *escrow* or conditional deed. Its delivery is not dependent upon any condition to be performed, but it is a valid deed from the beginning, and the holder is but a trustee or agent for the grantee. In such a case the grantor has parted with all control over the deed. Perkins, §§ 143, 144; 6 Mod. 217; *Foster v. Mansfield*, 3 Met. 412; 4 Kent's Com. 455; *Stillwell v. Hubbard*, 20 Wendell, 44.

But so long as a deed is within the control and subject to the authority of the grantor, there is no delivery. And whether in the hands of a third person or in the desk of the grantor, is immaterial, since in either case he can destroy it at his pleasure. To make the delivery good and effectual, the power of dominion over the deed must be parted with. Until then the instrument passes nothing; it is merely ambulatory, and gives no title. It is nothing more than a will defectively executed, and is void under the statute. Rev. Stat. chap. 156, § 6; *Habergham v. Vincent*, 2 Ves. Jr. 231; Powell on Dev. 13; 1 Rob. on Wills, 59; 4 Bro. Ch. 353; Rob. on Frauds, 337.

The case of *Habergham v. Vincent* was that of a deed, to take effect by way of appointment, after the death of the party. The subject was elaborately discussed and fully considered by the Chancellor and Justices Wilson and Buller. In the course of the discussion, Buller says: "A deed must take place upon its execution or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing that interest, to be conveyed at the execution, but a will is quite the reverse." And, after examining the various authorities upon the point, he adds: "These cases have established that an instrument in any form, whether a deed poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law and in equity, and in one of them there were express words of immediate grant, and a consideration to support it as

a grant; but as upon the whole the intention was that it should have a future operation after death, it was considered as a will." And the court all held, that the instrument then under consideration, though called a deed, though in form a deed, was in its nature testamentary, and being attested by only two witnesses, could not pass the freehold estate contrary to the provisions of the Statute.

Again, delivery of a deed is as essential to pass an estate as the signing, and so long as the grantor retains the legal control of the instrument, the title cannot pass any more than if he had not signed the deed. A deed may be signed by a third person by virtue of a power-of-attorney, duly executed, and so may it be delivered to a third person, to be delivered to the grantee. But the authority in such cases must be executed during the life of the grantor, otherwise it "availeth nothing," for no man can create an authority which shall survive him. After his decease the right "is forthwith in the heir." Lit. § 66; Willes, 105; Co. Lit. 52 b. There must be a time when the grantor parts with his dominion over the deed, else it can never have been delivered. So long as it is in the hands of a depositary, subject to be recalled by the grantor at any time, the grantee has no right to it, and can acquire none; and if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it. The depositary must have had such a dominion over the deed during the lifetime of the grantor as the latter could not interfere with, in order to have any control over it after his decease.

We think the instructions of the court below were correct; and that if the grantor, until her death, reserved the right to recall the deed from the hands of the depositary, there was no delivery.

The law of the case is not changed by treating this instrument as a deed of bargain and sale, or by way of covenant to stand seised for uses, as contended by the defendant's counsel. The Statute of Uses, 27 Henry VIII., has been adopted in this State, and a freehold estate *in futuro* may be thus conveyed. *French v. French*, 3 N. H. 234; *Bell v. Scammon*, 15 N. H. 381. This instrument may perhaps be regarded either as a deed of bargain and sale, or as a covenant to stand seised for uses. A bargain and sale requires a pecuniary consideration. 4 Cruise, 110; *Jackson v. Fiske*, 10 Johns. 456; and a conveyance to stand seised for uses requires the consideration of blood or marriage. 4 Cruise, 120; 4 Kent's Com. 493; *Rex v. Scammonden*, 3 Term, 474; *Underwood v. Campbell*, 14 N. H. 398. This instrument had expressed in it a small pecuniary consideration, and the evidence would seem also to show a sufficient relationship upon which to found a deed to stand seised for uses. But delivery is as essential to the valid operation of an instrument of this kind as to one conveying the estate immediately; and the jury having found that this deed was never delivered, a verdict for the plaintiff followed as a necessary consequence.

If the owner of land desires to convey the same, but not to have his deed take effect until his decease, he can make a reservation of a life estate in the deed; or it may be done by the absolute delivery of the deed to a third person, to be passed to the grantee upon the decease of the grantor; the holder in such case being a trustee for the grantee. But if he wishes to retain the power of changing the disposition of the property at his pleasure, that can only be properly effected by will. So long as he retains the instrument, whether in the form of a deed or will, in his power, the property is his.

The motion in arrest of judgment cannot prevail. The count was sufficient after verdict.

The verdict having been returned for the plaintiff, and the rulings and instructions to which the defendant excepted having been sustained, it becomes unnecessary to consider the exceptions which were taken by the plaintiff, and there must be

*Judgment on the verdict.*¹

Marston, with whom was *Christie*, for the defendant.

Morrison, Fitch, and Stanley, with whom was *Wells*, for the plaintiff.

WELCH v. SACKETT. 40

SUPREME COURT OF WISCONSIN. 1860.

[Reported 12 Wis. 243.]

DIXON, C. J.² The question which was considered by far the most important, and upon which the counsel bestowed the most attention, citing nearly all the English and American authorities, calls for the determination, in a case where a mortgage of personal property from a debtor to a creditor, is executed in the absence and without the knowledge of the latter, and delivered to a stranger for his use, of the time at which the title to the property mortgaged vests in the mortgagee, as between him and another creditor of the mortgagor who acquired an interest in it by attachment between the time of the delivery to the stranger and the time when the mortgagee actually received notice of and accepted it. Whilst it must be admitted that there is some conflict in the adjudications upon this subject, still both natural reason and the weight of authority tend to the same conclusion, which is, that the title in such case only vests from the time there is an acceptance in fact on the part of the mortgagee. On principle I think it may be laid down as an indubitable proposition in such case, that the title does not vest in fact, until the mortgagee has actually assented to the conveyance; and consequently, that until such assent it remains in the mortgagor. While

¹ See *Baker v. Haskell*, 47 N. H. 479 (1867); *Barrows v. Barrows*, 138 Ill. 649 (1891); *Williams v. Daubner*, 108 Wis. 521 (1899); *Kenney v. Parks*, 125 Cal. 146 (1899). Cf. *Lippold v. Lippold*, 112 Iowa, 134 (1900).

² The statement of the case and part of the opinion are omitted.

all the courts acknowledge the correctness of principles which lead unerringly to this result, and clearly and positively exclude any other, it is somewhat strange that any should have been found to adopt a conclusion directly opposed to it. All agree that it is necessary to the validity of every deed or conveyance, that there be a grantee who is not only willing, but who does in fact accept it. It is a contract, a parting with property on the part of the grantor, and an acceptance of it by the grantee. Like every other contract, there must be a meeting of the minds of the contracting parties, the one to sell and convey, and the other to purchase and receive, before the agreement is consummated. If there be anything in legal principles, or in common sense, it is an unpardonable absurdity to say, that a contract can be completed in the absence and utter ignorance of one of the contracting parties; that he can or does, under such circumstances, assent to, or agree to become bound by it. The idea that a contract could be thus made, and that title to property could pass into a party without his knowledge or consent, and out of him without any motion or act of his signifying his willingness, but merely by his refusal to receive it at all, had its origin at a period in the history of the common law, when the legal mind, instead of being governed in its conclusions by a steady application of the clear and rational principles of the law to plain matter of fact, and by arguments to be drawn therefrom, was too frequently influenced by a mysterious and fanciful logic, that depended for its support upon artfully devised fictions and falsehoods, which for the most part were as repugnant to reason as they were unnecessary to the proper administration of justice. The discovery that such things could be done, is, I believe, attributable to the inventive skill of Justice Ventris, as exhibited in the case of *Thompson v. Leach*, 2 Vent. 198, decided about the year 1690; at least several courts and judges since that time, with many complaints, have agreed in giving him the credit of having proved something on this subject which none of them could understand. The substance of his proposition is, that a deed of lands made to a party, without his knowledge or consent, and placed in the hands of a third person for his use, is a medium for the transmission of the title to the grantee, and takes effect so as to vest it in him, the instant the deed is parted with by the grantor, and if the grantee, upon receiving knowledge of it, rejects it, such rejection has the effect of revesting the title in the grantor by a species of remitter. Inasmuch as this is the only attempt at sustaining it by argument to be found in the books, the more recent cases having, without discussion, gone off almost entirely on the strength of the *authorities*, I propose to examine some of the positions assumed by him, upon which his argument mainly depends, and from which, I think, its fallacy and the incorrectness of his conclusions will be clearly made to appear. He admits, what is universally conceded to be an indispensable element of every grant, namely, that it should be accepted by the grantee, and says, "that an assent is not only a circumstance, but it is

essential to all conveyances ; for they are contracts, *actus contra actum*, which necessarily suppose the assent of all parties ;" but avoids the difficulty into which the admission of this well settled principle brings him, by saying, " that because there is a strong intendment of law, that for a man to take an estate is for his benefit, and no man can be supposed to be unwilling to that which is for his advantage," therefore the law will presume that the grantee has accepted a conveyance before a knowledge of its execution and delivery has come to him. Upon the foundation of this hypothesis, misnamed by him a *presumption of law*, the falsity and unreasonableness of which are so self-evident that reasoning can hardly make them plainer, he proceeds to the erection of his superstructure. Assent or acceptance on the part of the grantee or other party to a deed or other instrument, by means of which the title to property, whether real or personal, is to be transferred to him, or by which he is in any other manner to become bound, is a *fact*, the truth of which is to be established by competent evidence, before such deed or other instrument can be adjudged to have a legal existence. Like every other fact, it may be established by direct evidence, or its existence may be inferred or presumed from other facts already in proof. But I deny that the existence of one fact is to be inferred or presumed from the existence of others, when the connection between the former and the latter is such that according to the course of nature it plainly appears that the former cannot exist. In other words, I deny that the existence of any fact may be shown by proving others which conclusively show its non-existence, or that the legitimate mode of establishing the truth of a matter is by indubitably proving its falsehood. Justice does not require, nor does the law tolerate such an absurdity. The learned justice says, that where a deed is executed by the grantor and delivered to a stranger for the use of the grantee, without the previous advice, direction or authority of the grantee, and without his knowledge, the law will presume that the grantee assents to it, the moment it is delivered to the stranger. *Assent* is an act of the mind, — that intelligent power in man by which he conceives, reasons and judges, and of which it is a primary, invariable and most familiar law that it cannot act with reference to external objects, until, through the medium of the senses, it is impressed with or *knows* their existence. Hence, without such impression or knowledge, there can be no assent, no *actus contra actum* ; and to presume it in opposition to the facts, is to presume that which is impossible ; which the law, the rules and precepts of which are in conformity with the unchanging truths of nature, will never do.

"A presumption," says Mr. Starkie, "may be defined to be an inference as to the existence of one fact, from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, it is necessary that there be a previous experience of the connection between the known and inferred facts, of such a nature that as soon as the existence of the one is established, ad-

mitted or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject." Presumptions thus defined, he says, are either *legal and artificial* or natural, and may be divided into three classes. 1st. Legal presumptions made by the law itself, or presumptions of *mere law*. 2d. *Legal* presumptions made by a jury, or presumptions of *law and fact*. 3d. Mere natural presumptions, or presumptions of *mere fact*. The definition which he so clearly and accurately gives, although applied by him to all presumptions, is perhaps more strictly applicable to the latter class. The assent to a deed or other instrument by the grantee or other party, being a matter of *mere fact*, it is obvious that to the latter class also would belong a presumption in relation to such assent, in a case where such presumption could properly be indulged. But, whether the presumption be assigned to the one or the other of these classes, the position of the learned justice is equally untenable; for in no instance, not even the most artificial and arbitrary, does the law indulge in presumptions which are directly contradicted by the facts on which they are predicated. The known facts, though often insufficient of their own natural force and efficacy, to generate in the mind a conviction or belief of those which are inferred, are always, to say the least, not inconsistent with or opposed to them. If for example we take the case instanced by Mr. Starkie, of the presumption of the satisfaction of a bond after the lapse of twenty years, without payment of interest or other acknowledgment of its existence, while if a single day less than the twenty years has elapsed, such presumption does not arise, we find it to be extremely arbitrary and technical. No natural reason can be given why the lapse of the last day should operate to produce in our minds a conviction or belief of payment, while the lapse of all the days and years preceding it does not so operate. Such is not its effect. But as from common experience of the affairs of men, there arises in the mind, after the lapse of many years without payment of interest or other acknowledgment, a strong probability that a debt has been satisfied, and as the law loves certainty and industriously avoids doubts, it has from these motives *arbitrarily* fixed a period of time at the expiration of which this probability shall ripen into and take effect as a presumption of law, and at which the rights and position of the parties in reference to such debt, flowing from the *mere lapse of time*, unaccompanied by other circumstances, shall become determinate and certain. This presumption, which is in so many respects *artificial*, is in no respect inconsistent with the fact from which it is said to arise. On the contrary, though not conclusively sustained, it is strongly corroborated by the fact; since experience teaches that it is very improbable that the holder of the bond would, unless it were satisfied, permit such a space of time to elapse without receiving the interest or obtaining from the maker some other evidence of its non-payment. The same is true of that most purely artificial presumption, that a bond or other specialty was executed upon a good consideration, which is so peremp-

tory and absolute in its nature that it cannot be rebutted by evidence; whilst the consideration of another instrument, executed and delivered under precisely the same circumstances, and in the same words, but not under seal, may be freely inquired into and impeached; yet there the conclusion that it was made upon a good consideration is entirely consistent with the facts from which it is drawn; for there is much reason for supposing that without a good consideration, it would not have been sealed and delivered. Without multiplying illustrations, I think it will be found that in no instance (unless the present case is to form an exception) does the law infer the existence of facts in clear and direct opposition to those upon which the inference rests. It does not do so here. Reason rebels against it, and neither justice nor equity demands it. The only result of dropping the absurdity will be that, as in the present case, in a contest between two equally meritorious parties, the title to the property of which a conveyance was sought to be made, will be adjudged to be in him whom reason designates as the true owner.

The mistake of the learned justice consisted in his carrying the presumption of law so far as to say that it presumes that a person has consented to that of which he knows nothing, which is an impossibility; instead of saying, what was more truly said by the more logical and cautious courts and judges of his time, and by Lord Ellenborough, in *Stirling v. Vaughn*, 11 East, 623, namely, that, if nothing appears to the contrary, the law presumes that he *will* accept that which is for his benefit, when he is informed of it, which assent, in the absence of intervening rights or equities, will have relation back to the time of delivery for his use, and make his title good as from that date. After a brief argument of this sort, he proceeds to say, "that very odd consequences and inconveniences would follow, if surrenders should be ineffectual till an express consent of the surrenderee," and that most disastrous effects upon estates and conveyancing in England would ensue, unless her courts adopted and upheld his absurdity. It is said that one error surely gives rise to another and a greater. This saying was never more aptly and forcibly illustrated, than by the fantastic feats which the learned justice makes the common law, the sober common sense of ages, perform by way of getting the title back again into the grantor in case the grantee refuses to accept the conveyance. He says that after, by this kind of one-sided contract, it has got into him without his knowledge, it remains with him without his consent until he absolutely rejects and spurns the offer, and that then, by some magical power of the law, such rejection, without deed or other writing, becomes an instrument of conveyance, by which the legal title to land is conveyed from one who has it to one who has it not, against the express wishes of the latter and in despite of his own deed, the highest and most solemn act known to the law, by which he could rid himself of it. It is not surprising that the learned and logical Chief Justice Gibson, in *Read v. Robinson*, 6 Watts & Sergeant, 329, while commenting

upon what he calls "the masterly argument of Justice Ventris, in *Thompson v. Leach*," says, that "the difficulty is to comprehend how the remitter can take effect without displacing intermediate interests springing from the rejected deed;" and then, as if in despair of ever comprehending it, he dismisses the subject from his mind by saying, "but the authorities conclusively prove that it may." All agree that neither the grantor nor the stranger who consents to receive and hold the deed, can, by their acts, bind the grantee, and that the latter may, on receiving notice of it, repudiate it altogether. If the title vests in the grantee at once, it must, of course, vest according to the terms of the conveyance, and in the case of an absolute conveyance, he would have an absolute title. If, after delivery to the stranger, and before notice to the grantee, a creditor of the latter should fasten upon the property by execution or attachment, no reason can be given why he could not hold it. If it is the property of the grantee, it follows, as of course, that the creditor would have this right, and that he would at once acquire a lien to the extent of his demand. Suppose, after this is done, that the grantee, on receiving notice, refuses to accept the conveyance, what becomes of the property? Does the refusal unbind and set the property free from the seizure of the creditors, and remit the title at once back to the grantor? Or does the intendment of Justice Ventris step in, in behalf of the creditor as well, and say, because the grant is presumed beneficial to the grantee, and he might, at some future period accept it, that therefore he shall be deemed to have accepted it before the seizure, and at a time when he was utterly ignorant of it, and thus enable the creditor to withhold the property from the grantor, by which means it would happen that although it was neither bought nor sold, the grantor would, without consideration, lose it, and the grantee enjoy the full benefit of it on the same terms? Knowing of no rational or satisfactory answers which can be given to these and various similar questions which will readily suggest themselves to the reader, I leave them to be replied to by those who maintain that the title to property, real or personal, may, without words written or spoken, or other act of transfer, be thus mysteriously passed and repassed between parties by contract. I deny that it may be. It seems to me very plain, that it does not pass in fact until the grantee has actually consented to receive it; and, as of course, that it remains with the grantor, who is unable, without such consent, to vest it in the grantee. No other conclusion is consistent with the doctrine that a grant is a contract, and that the assent of the grantee is necessary to give it validity. The justice assumed the question in controversy by saying that the execution and delivery of the deed to the stranger passed the title out of the grantor, and then he was under the necessity of resorting to these further absurdities in order to account for it; for he says, "that it is not a slight matter, but what the law much considers, and is very careful to have the freehold fixed," and not "under such uncertainty, as a stranger that demands right should not know

where to fix his action." If he had considered that the operation of the deed was suspended, or that it did not take effect until the grantee had assented, he would have been saved the trouble of drawing so largely on his imagination to show where the title was, and how it was thereafter to be controlled. It is a matter of no small moment, and of just pride to the bench of England, that Justice Ventris, at the time he wrote this wonderful argument, *dissented*, and that the other members of the Court of Common Pleas, viz.: Pollexfen, chief justice, and Powell and Rokeby, associates, were of opinion in the case, "that there was no surrender till such time as the surrenderee had notice of the deed of surrender and agreed to it," and that it was so adjudged by that court; and that the case was afterwards taken by writ of error to the King's Bench, of which Lord Holt was at the time chief justice, and the judgment of the Common Pleas "was there affirmed by the unanimous consent of the whole court." It was afterwards brought by error into the House of Lords, where, as it is said, upon the reasons contained in Justice Ventris' argument, the judgment pronounced in both superior courts was reversed. Thus we have on the one side the legal learning, and almost the unanimous opinion of the courts, and on the other the judgment of reversal of the House of Lords, the great majority of whom knew very little, and cared less, about the correct settlement of legal principles.

The argument is of a piece with that kind of reasoning once employed to prove that titles to estates were "in abeyance," "in *nubibus*," and "in *gremio legis*," the folly of which is so thoroughly exposed and exploded by the severe and searching logic of Mr. Fearne, in his admirable treatise on Remainders. See pages 360 to 364, inclusive. It was held, in case of a lease to one person for life, remainder to the right heirs of another still living, that no estate remained in the grantor; and because there was no heir, for the reason that no one can be heir during the life of his ancestor, but only after his death, and because the tenant took only a life estate, the remainder was said to be in abeyance, in the clouds, or in the bosom of the law. These opinions were founded upon the very same assumption as that of Justice Ventris, namely; that the remainder passed out of the donor at the time of livery, and consequently that no estate remained in him thereafter; and because the title must always be somewhere, the advocates of the doctrine sent it to the clouds; "though," says Mr. Fearne, "by some sort of compromise between common sense and the supposition of an estate passing out of a man, when there is no person *in rerum natura*, no object beside hard and hardly intelligible words, for the reception of it at the time of the livery, they are compelled to admit such a species of interest to remain in the grantor, as upon the determination of the estate before the contingent remainder can take place, entitles the grantor, or his heirs, to enter and reassume the estate."

The questions are so closely allied, and the substrata of the two follies are so exactly alike, that Mr. Fearne's reasoning is fully in point.

And it is certainly refreshing, after a perplexing and vain effort to understand that which never was and never will be intelligible, to take up an author, who, like Mr. Fearne, treats the subject upon the principles of common sense. He intimates a conviction, that instead of the title to estates being in the clouds, there is a much stronger probability of *caput inter nubilia condit*, of the head of the inventor of the fiction having been buried or hidden in them. He says: "I cannot but think it a more arduous undertaking, to account for the operation of a feoffment or conveyance, in annihilating an estate of inheritance, or transferring it to the clouds, and afterwards regenerating or recalling it at the beck of some contingent event, than to reconcile to the principles as well of common law as of common sense, a suspension of the complete, absolute operation of such feoffment or conveyance, in regard to the inheritance, till the intended channel for the reception of such inheritance comes into existence." The same is true of the delivery of a deed to a third person for the use of the grantee, without his knowledge or previous direction. It is far more compatible with common law and common sense, to say that its operation is suspended until the happening of the event indispensable in the law to its validity, namely, an acceptance by the grantee, than to make the law perform the wonderful exploits of vesting and recalling the title contrary to its best settled and soundest principles. I am of opinion therefore, that the defendants in error took no interest in the goods in question by virtue of their mortgages, until after the plaintiff in error had seized them upon process of attachment, and consequently, that they cannot maintain their action.

Much was said in this case, about the manner in which the mortgages were delivered. There can be no doubt that so far as the mortgagor was concerned, the delivery was good. They were placed by him in the hands of a stranger, to be by him delivered to the mortgagees, and thus passed beyond his reach and control, unless the mortgagees, within a reasonable time after notice, should refuse their assent. This made the delivery, as to the mortgagor, valid and binding, which is all I understand the author of the Touchstone to mean, when he says that a deed "may be delivered to any stranger for and in behalf and to the use of him to whom it is made." But a delivery by the donor to a third person, for the use of the donee, and an acceptance by the latter, are two very different things. By the former, the donor signifies his willingness to part with the property, whilst by the latter the donee makes known his assent to receiving it, and both must concur before the title is changed or affected. It was formerly, and may perhaps by some be still supposed, that there can be no delivery without at the same time an acceptance; that they are correlative, inseparable parts of the same transaction, and must both occur at the same instant of time; and hence, in part, the fiction of relation, by which in case of a delivery by the grantor to a stranger, the subsequent acceptance by the grantee was carried back in legal contemplation to the time when the grantor

gave the deed to the stranger, in order to save the logic of the law and to preserve "the eternal fitness of things." It seems to me that every case in which it has been adjudged that there may be a delivery to a stranger, and that a subsequent ratification by the grantee will make the instrument effectual for the purposes intended, falsifies this notion and proves that in every such case there may be, what there is in fact, a delivery by the grantor at one time to a third party, and an acceptance by the grantee from such third party at a subsequent and different time. Such is the common sense of the transaction; and it is better and more rationally disposed of without than with the aid of the fiction. But if the fiction must be employed, then the maxim, *in fitione legis semper subsistit equitas*, applies, and it will not be allowed to operate when it infringes or violates the rights of strangers. It is only resorted to in furtherance of justice and to prevent injury. In this case the plaintiff in error is a stranger to the mortgagees. He represents the rights and interests of the creditors of the mortgagor, who in good faith sued out and levied their attachments upon the goods, thereby lawfully acquiring a lien upon them; and it cannot be said to be in furtherance of justice, to postpone their demands thus legally secured, to those of the mortgage creditors, which are in no sense more equitable or just. The struggle is between innocent persons, to prevent loss, and the fiction ought not to be resorted to for the purpose of helping one as against the other. The transaction must be left to stand upon its simple and naked truth.

It is unnecessary for me particularly to refer to the cases cited by counsel. Those cited for the plaintiff in error, in their principles *substantially* sustain the views which I have taken. Many of those cited by the counsel for the defendants in error, are not directly applicable, whilst some of them clearly and positively uphold the opposite doctrine. Of this latter character, besides the English, are *Buffum v. Green*, 5 N. H. 71; *Wilt v. Franklin*, 1 Binney, 502; and *Merrills v. Swift*, 18 Conn. 257. In the first it does not clearly appear whether notice of the execution of the deed or the service of the process of attachment took place first. Both happened on the same day, but the court seem to adopt the theory that the title vested before notice to the grantee, and therefore the time of the service of the writ being immaterial, is not particularly noted. The principle upon which the doctrine rests is not discussed at all. The same is true of the case in 18 Conn. In both it is taken for granted that such is the effect of a delivery to a stranger. In *Wilt v. Franklin* there was a dissenting opinion of Justice Brackenridge, in which the fallacy of the reasoning of his two associates is so calmly and clearly brought out that it would be folly for me to do more than refer the reader to it. The case of *Doe ex dem. Garnons v. Knight*, 5 B. & C. 671, was determined upon the binding authority of previous adjudications. The question having hitherto remained undecided in this State, no such obstacle to its correct determination exists.

In the case of *Cooper v. Jackson*, 4 Wis. 537, it was expressly ruled,

that "it is essential to the legal operation of a deed, that the grantee named therein assents to receive it, and there can be no delivery without such acceptance, but such acceptance need not be in person; it is sufficient if authorized or approved by the grantee." In that case the title of the grantee was held to be good as against the judgment creditor of the grantor, upon the express ground that there was a previous understanding between the grantor and grantee that the deed should be executed by the grantor and delivered by him to the register of deeds, to be recorded. This the court says constituted the register the agent of the grantee for the purpose of receiving it. Upon this subject the following language is used: "The case at bar falls fully within the principle of *Hedge v. Drew*" (12 Pick. 141, previously noticed and commented upon in the opinion). "Here the grantee saw the deed after it was drawn, and the parties came to the understanding that the deed should be executed and left with the register to be recorded. There was an absolute divesting by the grantor of his estate in the land, and the deed was delivered to the register, who, *pro hac vice*, may be considered the agent of the grantee to receive it. *It is readily distinguishable from the cases where the grantor executes the deed without the knowledge of the grantee.*" In the case of *McCourt v. Myers*, 8 Wis. 236, there was no attempt by the mortgagor to deliver the chattel mortgage to the city clerk, or any third person, for the use and benefit of the mortgagees, and consequently no question upon the effect of such delivery arose. The only point adjudicated was, that the mere act of the mortgagor in causing the mortgage to be filed in the office of the clerk, was not such a delivery as would operate to give the mortgagees any title or interest in the goods specified in the mortgage.

*The judgment of the Circuit Court is reversed, and a new trial awarded.*¹

Smith, Keyes, and Gay, for plaintiff in error.

Collins, Atwood, and Haskell, for defendants in error.

DERRY BANK v. WEBSTER.

3 } SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1862.

[Reported 44 N. H. 264.]

THIS is a bill in equity, and the bill, answers and proofs sufficiently appear in the opinion of the court.

H. F. French, for the plaintiff.

James W. Emery, for the defendants.

BELLOWS, J.² This is a bill in equity by the Derry Bank against

¹ See accord, *Hulick v. Scovel*, 9 Ill. 160 (1847); *Day v. Griffith*, 15 Iowa, 104 (1863); *Woodbury v. Fisher*, 20 Ind. 387 (1868); *Parmelee v. Simpson*, 5 Wall. 81 (U. S. 1866); *Commonwealth v. Jackson*, 10 Bush, 424 (Ky. 1874).

² Only that part of the opinion is given which relates to the question of delivery.

John G. Webster and Nathaniel F. Emerson. The plaintiff claims title to certain lands in Chester, formerly the property of said Emerson, by virtue of the levy of executions against him, one in favor of the Carroll County Bank, and the other in favor of one Barnes; the bill alleging a lien upon said lands, by attachment made December 17, 1857, and a levy in due time to preserve it; and a transfer of the title so acquired to the plaintiff.

The bill states that Webster claims title to the same land by deed from the said Emerson, dated November 16, 1857, but that the deed was not in fact delivered until after the attachment, and that the price was not paid until after the attachment and notice of it; and, also, that the conveyance, whenever made, was fraudulent and void as to Emerson's creditors; and the plaintiff prays that the aforesaid deed of November 16, 1857, be decreed to be void. . . .

This brings us to a consideration of the title of Webster as derived from the deed of November 16, 1857, and the first question is, Was the deed delivered before the attachment? On this point the bill charges that the deed, although dated November 16, 1857, and recorded December 17, 1857, was not in fact delivered to Webster, or any person for him, until long after it was recorded, and after the attachment. The answer of Webster states a bargain made November 16, 1857, for the farm, at \$6,300; \$1,358 to be paid in the note of Emerson and Fitz, two notes of Webster in one and two years, and the balance, after deducting the amount of an outstanding mortgage, to be paid in cash; and that, in performance thereof, the Emerson & Fitz note was delivered to Emerson and cancelled, and the two \$1,500 notes, dated November 16, 1857, made and executed; that, as the wife of said Emerson was not then in Boston, where this business was done, the two notes of \$1,500 each and the money were not delivered to said Emerson until Webster was informed that the deed was executed and recorded; that on the 18th of December, 1857, Emerson was in Boston, and informed him (Webster) that the deed of the farm had been made and executed, and put on record, according to arrangement, and therefore he delivered the two notes to him and paid him the balance in cash, or its equivalent.

It will be seen, then, that the bill charges that the deed was not delivered to Webster, or any person for him, until after the attachment, and Webster's answer does not affirm that it was; and, therefore, the allegations in the bill not being denied are admitted by the 8th rule in chancery. Webster's answer goes no farther than to allege the making of the contract of sale, the giving of the note of Emerson & Fitz to Emerson, who cancelled it, and the making and executing of the two \$1,500 notes, in performance of the contract, but that the two notes and cash balance were not delivered to Emerson until Webster was informed by Emerson, on the 18th of December, that the deed was made and recorded according to arrangement. Here is no allegation that the deed was delivered to Webster, or to any one for him; and what he

does state is perfectly consistent with the allegations in the bill that there was no delivery, but that until the attachment the deed remained within the control of the grantor.

It is not stated that it was agreed that the deed should be delivered to the register of deeds for the grantee, or even that upon putting the deed upon record the price should be paid, but simply that the balance was not paid until the grantee was informed of the execution and record. The statement that, on being informed by Emerson that it was executed and recorded according to agreement, the payment was made, falls far short of an allegation that by the agreement it was to be delivered to the register for the grantee, and to take effect on such delivery.

It would seem, then, that upon the bill or answer of Webster, it is to be taken that the deed was not delivered until after the attachment.

If the answer of Emerson as matter of pleading could avail Webster, it is by no means clear that it would amount to an allegation of a delivery of the deed. He states the bargain as Webster does, the delivery and cancelling of the Emerson & Fitz note, and the making of the two \$1,500 notes, and he says "that by reason of Emerson's wife being in Chester, the conveyance, or deed of said farm, could not be fully executed at that time and place, and hence it was arranged that said Emerson should leave said two notes of \$1,500 each, and the amount in cash, in the hands of Webster, until the deed should be executed by said Emerson and his wife, and put on record;" and he goes on to say that the deed was made the next day, but, owing to pressing calls and engagements, not put on record until December 17. This, it will be perceived, does not deny the allegations in the bill that there was no delivery, but states circumstances from which it might be urged that a delivery could be inferred. It does not, however, state that it was agreed that a delivery to the register should be a delivery to the grantee, or that, on delivery at the registry, the deed should take effect, but simply that the two notes and money should be left in the hands of the grantee, until the deed should be executed by Emerson and wife, and put on record; and it is not stated that on doing that the deed should be deemed to be delivered, or that the register should receive it for Webster; and we think, on the whole, that Emerson's answer falls short of that distinct and explicit denial of the allegations in the bill which is required. As with the answers so we think it is with the proof. Indeed, taking into consideration the refusal of Webster to testify, and the indefinite character of Emerson's statements, we are impressed with the belief that the answers go as far in denial of the allegations of the bill as the actual state of the facts would warrant.

That the mere sending of the deed to the registry for record is not a delivery is well settled; *Barnes v. Hatch*, 3 N. H. 304; *Maynard v. Maynard*, 10 Mass. 456; *Samson v. Thornton*, 3 Met. 281; *Oxnard v. Blake*, 45 Me. 602; even although the grantor intended it to take effect; for an acceptance by the grantee, express or implied, is

necessary. 4 Kent Com. 455, 456. *Oxnard v. Blake*, 45 Me. 602, note, and cases before cited. *Jackson v. Phipps*, 12 Johns. 418. In this case it had been agreed between a creditor and debtor that the latter should give the former a deed of his farm as security, and accordingly the debtor made and executed the deed, and sent it to the registry to be recorded, without the grantee, or any one for him, being present, or receiving the delivery of it, and it was held that this was no delivery; that a delivery *ex vi termini* imports that there be a recipient. And the case of *Jackson v. Dunlap*, 1 Johns. 114, is cited as holding that it is essential to the operation of a deed that the grantee assents to receive it, and that there could be no delivery without an acceptance. So is *Jackson v. Richards*, 6 Conn. 619, where it was held that an acceptance is essential, and that there was nothing in the act of recording equivalent to a delivery. To make the delivery effectual, the grantor must part with all control over the deed. *Cook v. Brown*, 34 N. H. 460, and cases cited; *Doe v. Knight*, 5 B. & C. 671. Where a loan and security by way of mortgage of real estate was agreed upon, and the mortgage made and recorded, and shortly after the money paid over and the note given, held, the mortgage took effect from the payment of the money. *Weed v. Barker*, 35 N. H. 386; *Parker v. Dusten*, 22 N. H. 424. So is *Stevens v. Buffalo & N. Y. R. R.*, 20 Barb. 332; *Samson v. Thornton*, 3 Met. 281; *Parker v. Parker*, 1 Gray, 409. A delivery to the register of deeds for the use of the grantee, intending that it shall then take effect as a conveyance, with the assent of the grantee at the time, or afterward, is sufficient. 2 Greenl. Cru. Dig. tit. 32, ch. 2, § 64, and note; *Thayer v. Stark*, 6 Cush. 11. But a subsequent assent will not prevail against an intervening attachment, though, as between the parties, it would, by relation, give effect to the deed from the time of such delivery. *Ibid.*, and cases cited; *Harrison v. Phillips Academy*, 12 Mass. 461; *Jackson v. Rowland*, 6 Wend. 666; *Samson v. Thornton*, 3 Met. 281. And it is obvious that this must be so, because, until such assent, the title remains in the grantor. In *Canning v. Pinkham*, 1 N. H. 357, Woodbury, J., says that all that is incumbent on the grantee in order to perfect the delivery is that he accept or assent to what has been done by the grantor, before the latter revokes his intention to convey, and for this he refers to *Harrison v. Phillips Academy*, before cited.

And we think that an attachment by which all the interest of the grantor is taken, would be equivalent to such a revocation.

In the case before us we think that the proof is not sufficient to show a delivery of the deed to the register, or any other person, to the use of the grantee with his assent, with intent to place it beyond the control of the grantor, and to vest a present title in the grantee, but rather to place the parties in position to perfect the sale by payment of the price, and delivery of the deed at a future time, and leaving either party the power to decline to perfect the sale. It is true, the evidence tends to show that part of the price was paid; but that is only evi-

dence bearing upon the question whether the parties agreed to a delivery to the register. *Samson v. Thornton*, before cited.

In an additional brief for the defendant, the case of *Merrills v. Swift*, 18 Conn. 257, 261, is cited and commented upon. In that case a debtor, in failing circumstances, executed a mortgage of certain real estate to a creditor, as security for his debt, and delivered it to a third person, as his deed, for the benefit of the grantee, but without his knowledge at the time, he assenting to it, however, afterwards; and the court held that this was a good delivery, and vested the title at once in the grantee. This is put, however, upon the ground that the deed, being beneficial to the grantee, his assent was to be presumed; but such assent is not to be presumed unless the deed be clearly beneficial to the grantee, as in the case of a conveyance of property as collateral security for a debt, unattended with any conditions for delay or discharge, without full payment. In these and similar cases the assent of the creditor has been held to be presumed until a dissent is shown, for the reason that such security must be beneficial, and creditors would rarely be unwilling to receive it. See *Brooks v. Marbury*, 11 Wheat. 96. But it is held otherwise where conditions are annexed, such as that the creditors shall receive their proportion of the assets assigned, in full discharge of their debts, as in *Hurd v. Silsby*, 10 N. H. 108; so where the assignee lives out of the State, or his liability is limited to losses caused by his wilful default, as in *Spinney v. The Portsmouth Hosiery Company*, 25 N. H. 9; so where the assignment made provision for paying, first, a debt due to the trustee; then such creditors as might, within sixty days, become parties to the assignment; and thirdly, the debt of creditors named in a schedule, as in *Leeds v. Sayward*, 6 N. H. 83. In *Camp v. Camp*, 5 Conn. 291, where there was a lease by one who had no title to one who had already a good title, it was held that an acceptance could not be presumed. We think, indeed, that there is at the present time no disposition in the courts to extend the doctrine of presumed assent, for it seems to be the settled doctrine of the English courts, that when a debtor conveys property in trust for creditors, to whom the conveyance is not communicated, and the creditors are not in any manner privy to it, the conveyance operates only as a power to the trustee, which is revocable by the debtor in the same way as if he had given money to an agent to pay his creditors, to whom no communication had been made. *Acton v. Woodgate*, 2 Mylne & Keene, 492; *Smith v. Keating*, 6 M. G. & S. 136-158, where it was held that such power was revoked by the subsequent insolvency of the debtor. *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Harland v. Binks*, 15 A. & E. 713; and strongly in the same direction is *Williams v. Everett*, 14 East, 529, and *Ozard v. Blake*, 45 Maine, 602; see, also, *Wheeler v. Emerson*, 44 N. H. 182.

In the case before us the acceptance of the deed must be attended with an obligation to pay the price of the land, and therefore a duty would be imposed upon the grantee to which his actual assent would

be necessary. It is not like the cases of conveyances for security without conditions, or grants of property as gifts, where the benefits are clear and unquestionable, but, like the conveyance of property in full discharge of a debt, it is for the grantee to decide whether it is or is not for his benefit, and then to assent or dissent, as he may deem best. The case of *Tompkins v. Wheeler*, 16 Pet. 106, also cited by the defendant, is a case of a conveyance to certain preferred creditors, in trust for the payment of their debts, which conveyance, as appears from the answer of the debtor, was sent to the recorder's office for his creditors' use; and the court held that being absolute on its face, without any condition whatever attached to it, and it being for the benefit of the grantees, their assent was presumed. This, then, is like the case in Connecticut, where the conveyance was clearly beneficial. In *Hallick v. Scovill*, 4 Gilman, Ill. 177, a deed to a purchaser at a tax sale, who had paid the price, was made and delivered by the officer to a stranger, and it was held that, no acceptance having been shown, there was no valid delivery. The general question was much considered, and the English and American cases reviewed; and in accordance with this decision it is laid down in 2 Washburn on Real Property, 580, that "although several of the cases seem to sustain the doctrine that a delivery of a deed to a stranger, for the grantee, where it is obviously for his benefit, passes the title at once as an effectual delivery, the better opinion seems to be that no deed can take effect, as having been delivered, until such act of delivery has been assented to by the grantee, or he shall have done something equivalent to an actual acceptance of it."

Our conclusion then is that there was no delivery until after the attachment; and therefore, upon making the amendments indicated, there must be a

*Decree for the plaintiff.*¹

17

FISHER v. HALL.

COURT OF APPEALS OF NEW YORK. 1869.

[Reported 41 N. Y. 416.]

APPEAL from the judgment of the Supreme Court in the First Judicial District, affirming judgment for the plaintiff, on the report of W. T. McCoun, referee.

This action was brought by the plaintiffs, as devisees, under the will of Leonard Fisher, deceased, for the recovery of the possession of certain undivided interests in the premises situated in the city of New York, known as No. 66 Centre Street.

This will was executed in 1838, and the testator died February, 1834.

The defendants claimed title to the premises under a deed executed

¹ See *Johnson v. Farley*, 45 N. H. 506 (1864); *Hibberd v. Smith*, 67 Cal. 547 (1886); *Rittmaster v. Brisbane*, 19 Col. 371 (1894).

by Leonard Fisher, in his lifetime, dated September 19th, 1822, and retained among his papers until after the time of his decease, purporting to convey them to his son, George Fisher, and a deed executed and delivered by George Fisher to the defendant, James Hall. The issues in the action were referred to a referee, who reported in favor of the plaintiffs. From the judgment entered upon the report, the defendants appealed to the General Term of the Supreme Court in the First District, where the judgment was affirmed. And the defendant then appealed to this court. The facts, with reference to the execution of the deed and its custody, are fully stated in the opinions.

Marshall S. Bidwell, for the appellant.

Benjamin G. Ferris and *Amasa J. Parker*, for the respondent.


DANIELS, J. The deed from Leonard Fisher, to his son, George Fisher, was dated on the 19th day of September, 1822, and from that time until the month of September, 1835, when Leonard Fisher died, it appears to have remained in his possession, for it was found among his papers after his decease. If the evidence of George Fisher, taken upon the trial, was to be credited, and that, under the circumstances, was for the referee to decide, he knew nothing of the deed until December, 1840, when he procured it from a trunk containing his father's papers, previously deposited by the executors of his father's estate, in the office of their counsel. The deed contained an attestation clause, which was subscribed by two witnesses, stating that it was sealed and delivered in their presence. But no evidence was given, or probably could be given, as the grantor and both the witnesses were dead before the trial, showing what actually did transpire when the deed was executed, beyond that contained in the proof made by one of the witnesses before the commissioner, at the instance of George Fisher, after he had obtained possession of the deed. By the oath of this witness, which was taken on that occasion, it appeared that Leonard Fisher, the grantor, executed the deed, and acknowledged that he had executed it. Nothing more than that was stated by this witness to have taken place at that time, except the fact that he became a subscribing witness to the deed. No declaration was stated to have been made by the grantor showing that he intended the instrument should then take effect as his deed, or that any formal delivery was made of it to any person for the use or benefit of his absent son, who was the grantee named in it. This witness was produced for the purpose of proving that the deed had been legally executed by the grantor; and it may therefore be presumed that he stated all that he was able to disclose on that subject when he was before the commissioner for that purpose.

It was alleged in the complaint that the deed was *executed* by Leonard Fisher. And this, it was insisted by the defendant's counsel, could be relied upon as conceding a legal delivery of the instrument. Such may be assumed to be the ordinary legal signification of this term, but it was not what was intended by them, when they were used

in the complaint; for they were immediately followed by the qualifying and restricting averment, that the deed never was delivered by the grantor, or any one in his behalf, to George Fisher, but that it remained in the possession of Leonard Fisher until his decease, and was afterward found among his papers, and taken possession of by George Fisher, who was one of the executors. Instead of affirming, the complaint negatives the idea of a delivery of the deed, unless these facts themselves legally support the conclusion sought to be derived from them.

Under this state of the pleadings and the evidence, the referee found that the deed had been subscribed and sealed by Leonard Fisher; that the witnesses attested it, under the clause stating that it had been sealed and delivered in their presence; that the grantee was not then present, and remained ignorant of the existence of the deed until long after the death of his father, and that the latter, during the period of thirteen years intervening between the date of the deed and his own decease, continually remained in the possession of the premises, and in the receipt of the rents and profits to his own use. By these facts the referee must have intended to be understood as finding that the deed was not in fact delivered, although he has failed to say so in so many words; for he afterward follows them with his legal conclusions, one of which was, that the deed never took effect for want of delivery. This was indispensable to the support of the conclusion he arrived at, and the statement just referred to indicates it to have been his purpose to find that as a fact.

The facts thus found by the referee, as well as those alleged in the complaint, are insufficient to constitute a delivery of this deed. It is not necessary that the grantee, or his agent or servant, should be present at the execution, in order to have such a delivery of the instrument made as will give it operative vitality and effect. But it is necessary that it should be placed within the power of some other person for the grantee's use, or that the grantor shall unequivocally indicate it to be his intention that the instrument shall take effect as a conveyance of the property, in order to have it produce that result. The mere subscribing and sealing, accompanied with the ordinary attestation of those acts by the witnesses, which is all that there is any reason for supposing was done in the present instance, followed by the grantor keeping the deed in his own custody, and his continued possession or the premises, are not sufficient to constitute a legal delivery of a sealed instrument. Several old authorities in equity were cited upon the argument for the purpose of showing the rule to be different from this statement of it. And it must be confessed that they appeared to maintain that result; but they are evidently so directly opposite to the entire current of modern authority, both in the courts of this and of the other States, as well as of the United States, as to require them to be repudiated by this court. A rule of law by which a voluntary deed, executed by the grantor, afterward retained by him during his life in



his own exclusive possession and control, never during that time made known to the grantee, and never delivered to any one for him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title, is so inconsistent with every substantial right of property, as to deserve no toleration whatever from any intelligent court either of law or equity.

It was not sanctioned by anything required by the decision of *Doe v. Knight*, 5 B. & C. 671, for there the mortgage in controversy was made pursuant to an understanding on the part of the mortgagee that the debt due to him was to be secured by the mortgagor, and it was first declared by him to be his act and deed, and afterward actually delivered to his sister for the mortgagee. The case was tried before the jury, and so disposed of by the court upon the point whether even that was sufficient to constitute an effectual legal delivery; and it was held that it was, which was all that the case really decided. The case of *Souverlye v. Arden*, 1 John. Ch. 240, was equally as pointed in this respect in its circumstances; and the language of the chancellor, it will be found upon examination, was not designed to extend beyond them in his decision of this case. *Id.* 255, 6 In *Ruslin v. Shield*, 11 Georgia, 636, it was held that the attestation clause reciting that the deed was delivered, was not of itself sufficient to establish a delivery; and it was afterward held by the same court that there was no delivery of a deed, which the grantor concealed from the grantee, and held, not in subordination to him, but independent of his will, and with the intention that it should not go into his custody. *Rutledge v. Montgomery*, 30 Georgia, 641; see also *Critchfield v. Critchfield*, 24 Penn. 100. The authorities upon what is necessary to create a legal delivery of a deed, are well collected in part 2, Cowen & Hill's Notes [to Phil. Evid.], 3d ed., 826-31; and their general result is stated to be, that "to constitute a complete delivery of a deed, the grantor must do some act putting it beyond his power to revoke." "The delivery need not be to the party, but may be to another person, by sufficient authority from the party; or it may be to a stranger, for and in behalf and to the use of the party, without authority." *Id.* 826. And to the like effect are the cases of *Church v. Gilman*, 15 Wend. 656, 660, 661; *Stilwell v. Hubbard*, 20 Id. 44; *Merrills v. Swift*, 18 Conn. 257; *Tibbals v. Jacobs*, 31 Id. 428; *Bary v. Anderson*, 22 Ind. 36, 39; *Parmelee v. Simpson*, 5 Wallace, 81. In *Younge v. Gailbeau*, 3 Wallace, 636, 641, it was held that "the delivery of a deed is essential to the transfer of the title. It is the final act, without which all other formalities are ineffectual. To constitute such delivery, the grantor must part with the possession of the deed, or the right to retain it." A delivery may be inferred from the fact that the grantor has had the deed recorded; but it is not necessary to refer to the cases sustaining that principle, because the absence of that fact renders them inapplicable to the present controversy. To bring this case within the rule already men-

tioned, enough should have been shown to have been done to render the grantor a mere bailee of the deed for the grantee. No such relation was either proved by the evidence or found by the referee from it; and no title to the land consequently vested by virtue of the deed in the grantee, and for that reason, he could convey none to the defendant Hall. *Critchfield v. Critchfield*, 24 Penn. 100. As the grantor, Leonard Fisher, did nothing, and neither permitted nor authorized anything to be done or represented indicating that George Fisher owned the land described in the deed, there was no ground on which the principle of estoppel could be rendered applicable to the transaction.

All the judges concurring,

*Judgment affirmed.*¹

BOYD v. SLAYBACK.

SUPREME COURT OF CALIFORNIA. 1888.

[Reported 63 Cal. 493.]

APPEAL from a judgment of the Superior Court of San Diego County.

The action was brought against Robert Taggart, a minor, and against O. M. Slayback, as administrator of the estate of Mary B. Taggart, and as guardian of Robert Taggart, to quiet title to certain lands alleged to have been sold to the plaintiff by Mary B. Taggart. The plaintiff alleged that some time subsequent to the execution and delivery of the deeds to him, by which the lands were conveyed, they were left at the residence of Mrs. Taggart in a tin box, and that after her death it was discovered that the deeds had been abstracted. The defendant denied the execution and delivery. The deeds were not recorded.

The other facts appear in the opinion of the court.

Chase, Arnold and Hunsacker, and *Graves and Chapman*, for appellants.

Brunson and Wells, M. A. Luce and Will M. Smith, for respondent.

PER CURIAM.² The judgment must be reversed for error in the charge to the jury. The court below charged: "A grant, duly executed, is presumed to have been delivered; therefore, if you find from the evidence that Mrs. Taggart actually signed and acknowledged the deeds in question, the law will presume that they were duly delivered, and in order to defeat this presumption, the party disputing the delivery must show, by preponderance of proof, that there was no delivery."

This was error. A deed takes effect only from the time of its delivery. Without delivery of a deed it is void. No title will pass without

¹ See *accord*, *Anderson v. Anderson*, 126 Ind. 62 (1890); *Hawes v. Hawes*, 177 Ill. 400 (1890).

² Part of the opinion relating to other points is omitted.

delivery. 23 Cal. 528; 30 Cal. 208; 32 Cal. 610. It is for the party claiming under a deed to prove its delivery. Sometimes slight evidence will be sufficient to support a finding of delivery, but no legal presumption of delivery arises from the mere fact that the instrument is "signed." The acknowledgment only proves that it was signed.

*Judgment reversed and cause remanded for a new trial.*¹

SCHURTZ v. COLVIN.

SUPREME COURT OF OHIO. 1896.

[Reported 65 Ohio St. 274.]

MINSHALL, J.² There can be no question but that James E. Colvin waived his lien as a vendor by taking a mortgage on the granted premises and other lands of the grantee, to secure the purchase money. Such is the settled law of this state. The court's conclusion of law as to this is correct, and not now questioned by the defendant in error. So that the only question here presented, is as to whether it erred in its second conclusion, that, upon the facts found, the mortgage of James E. Colvin, being subsequent in point of time, is superior in equity to the Schurtz mortgage. Priority is claimed on the ground that at the time the Schurtz mortgage was taken, James E. Colvin held the legal title to his interest in the premises, subject, however, to a legal obligation to convey to James Colvin as purchaser, on his paying the purchase money or securing it to be paid. If the facts found will bear this simple construction, then there can be no question as to the correctness of the court's conclusion of law thereon. In such case the legal title of James E. Colvin would have been notice to the world of his rights in the property; and no one could have acquired an interest in it superior to his by mortgage or otherwise. The question, however, is whether the facts as found will bear this construction as between James E. Colvin and the Schurtzs. James E. Colvin had by a verbal agreement made in 1884, sold his interest in the premises to James Colvin, who went into possession under the agreement and was in possession at the time the Schurtz loan was made. Some time before the making of the Schurtz mortgage, James E. Colvin with his cotenant, Silas H. Colvin, executed a deed for the land to James Colvin, the purchaser, and placed it in the hands of a third person, Howard Colvin, to be delivered when the purchase money was paid or secured by mortgage. Afterward, for the purpose of enabling James Colvin to obtain a loan of money on the land, Howard delivered the deed to him that he might obtain a description of the premises and exhibit it

¹ See, accord, *Alexander v. de Kermel*, 81 Ky. 345 (1883).

² The opinion only is printed.

as evidence of his title. The facts found bear this construction and none other. It is true that from the facts found it was not to be regarded as delivered. But the law has always attached much importance to an overt act. It contravenes its spirit to allow that an act may be done with an intention contrary to the act itself. And whilst, as between parties, the intention may be shown, it seldom permits this to be done, where to do so would work a fraud on innocent third persons. Here, whilst James Colvin was in possession of the land and of a deed to it by James E. Colvin, of whom he had purchased, the Schurtzs, on the faith of these appearances, loaned him \$6,500, and took a mortgage on the land to secure its payment; and, as the court expressly finds, without any knowledge that the deed had ever been held as an *escrow* by any one, and that it was taken in good faith without any knowledge that James E. Colvin had or claimed any interest in or lien on the land.

It would seem on the plainest principles of justice, that under these circumstances James E. Colvin, as against the owner of the Schurtz mortgage, should not be heard to say that the deed had not in fact been delivered at the time the mortgage was made, and that his equity is superior to it. He trusted Howard with the deed to be delivered when the conditions had been performed. Howard violated his trust. He delivered it to the grantee that the latter might obtain a loan on the land by exhibiting it as evidence of his title. The loan was so obtained of persons who had no knowledge of the facts and were entirely innocent of any fraud in the matter. Who then should suffer the loss? It may be regarded as one of the settled maxims of the law, that where one of two innocent persons must suffer from the wrongful act of another, he must bear the loss who placed it in the power of the person as his agent to commit the wrong. Or, more tersely, he who trusts most ought to suffer most. And it would seem, that the rights of the parties in this case should be governed by this principle, unless there is some rigid exception established by the decessions, which forbids its application where a deed is delivered in *escrow*.

Before considering this question, it may be well to note that no importance can be attached to the fact that the deed, on the faith of which the loan was made, had not yet been recorded. A deed on delivery passes title to the land whether recorded or not. It takes effect on delivery. The object of recording a deed is to give notice to third persons, not to perfect it as a muniment of title. Where not recorded it will be treated as a fraud against third persons dealing with the land without notice of its existence. Hence, the first deed, if delivered, having been duly executed, passed the title to James Colvin. Recording it would have added nothing to its effect as a deed; and the failure to record it in no way influenced the conduct of any of the parties to the suit.

There are some cases which seem to hold that, where a deed is

delivered as an *escrow* to a third person to be delivered on the performance of certain conditions, no title passes if delivered without the conditions being performed; and that this is so as against an innocent purchaser from the vendee. *Everts v. Agnes*, 6 Wis. 463, is such a case. The argument there is that no title passes by deed without delivery; that where a deed is delivered by one who holds it as an *escrow*, contrary to the vendor's instructions, there is no delivery, and consequently an innocent purchaser acquires no title. To the objection that if this be true there is no safety for purchasers, the court said that if it be not true, there is none for vendors. This seems to be a misconception of the real situation of the parties. A vendor may protect himself. He may either retain the deed until the vendee pays the money or select a faithful person to hold and deliver it according to his instructions. If he selects an unfaithful person, he should suffer the loss from a wrongful delivery, rather than an innocent purchaser without knowledge of the facts. In purchasing land, no one, in the absence of anything that might awaken suspicion, is required, by any rule of diligence to inquire of a person with whom he deals, whether his deed had been duly delivered. Where a deed is found in the grantee's hands, a delivery and acceptance is always presumed. *Wash. Real Property*, 5th Ed., 312, pl. 31. The fact that under any other rule "no purchaser is safe," had a controlling influence with the court in *Blight v. Schenck*, 10 Penna. St. 285, 292. In this case the question was whether a deed had been delivered, the defendant being an innocent purchaser from the vendee of the plaintiff. In discussing the case the court used this language: "Here Curtis, who, it is alleged, delivered the deed contrary to his instructions, was the agent of the grantor. If a man employs an incompetent or unfaithful agent, he is the cause of the loss so far as an innocent purchaser is concerned, and he ought to bear it, except as against the party who may be equally negligent in omitting to inform himself of the extent of the authority or may commit a wrong by acting knowingly contrary thereto." And the case was disposed of on this principle.

The case on which most reliance is placed by the defendant in error, is that of *Ogden v. Ogden*, 4 Ohio St. 182. The facts are somewhat complicated. It seems to have grown out of an agreement for an exchange of lots between two of the parties, each being the equitable owner of his lot. The deed for the lot of one of them, David Ogden, was to be delivered by the legal owner to the other on his performing certain conditions, and was delivered to a third person to be delivered on the performance of the conditions. It was delivered without the conditions being performed; and was then mortgaged by the grantee to the defendants, Watson and Stroh, who claimed to be innocent purchasers for value. But it was charged in the bill that they took their mortgages with notice and to cheat and defraud the complainant; and it does not distinctly appear whether this was true or not. From the reasoning of the court it would seem that the deed had been ob-

tained from the party holding it in some surreptitious manner. It is first conceded "that if David reposed confidence in Gilbert, and he violated that confidence and delivered the deed, and loss is to fall on either David or the mortgagees, that David should sustain that loss, and not the innocent mortgagees." Instances are then given in which the rule would be otherwise—an innocent purchaser from the bailee of a horse, or of stolen property, or from one who had either stolen or surreptitiously obtained his deed. There is no room for doubt in either of these cases. But the court then observes that, "If the owner of land makes a deed purporting to convey his land to any one, and such person by fraud or otherwise procures the owner to deliver the deed to him, a bona fide purchaser from such fraudulent grantee without notice of the fraud, might acquire title to the land." This, we think, is equally clear; but, unless the deed in the case had been stolen or surreptitiously obtained, or the mortgagees were guilty of the fraud charged, then, on the reasoning of the court, the decree should have been in their favor. If the case is to be understood as holding differently, then it is not in accord with the later decision in *Resor v. Railroad Company*, 17 Ohio St. 189. Here the owner of a tract of land contracted to sell it to the company, but refused to deliver the deed until paid. An agreement was then made by which the deed was placed in the hands of the president, but it was not to be considered delivered until payment had been complied with, and the company went into possession. The president wrongfully placed the deed on record, and the company then mortgaged its entire property to secure an issue of bonds. The court held the bond-owners to be innocent purchasers, and that the plaintiff was estopped from setting up his claim as against them. It might be claimed that the delivery by Resor was to the purchaser, the company; and that a deed cannot be delivered as an *escrow* to the vendee. The latter statement is true. But as a matter of fact it was delivered to the president of the company and not to the company itself. There is no reason why the president could not have held it as an *escrow*, and under the agreement, must be regarded as having so held it. *Railroad Co. v. Iliff*, 18 Ohio St. 235; *Watkins v. Nash*, L. R., 20 Eq., 262; *Ins. Co. v. Cole*, 4 Fla. 359. The plaintiff trusted the president to hold the deed, and it was his wrongful act that disappointed him.

The supreme court of Indiana in a well-considered case, *Quick v. Milligan*, 108 Ind. 419, the facts of which are very similar to the case before us, held that where a deed is delivered to a third person to be delivered the grantee, who is already in possession of the land, on payment of the purchase money, and is delivered without the condition being performed that the vendor is estopped as against an innocent purchaser to set up his title. See also, and to the same effect, the following cases: *Bailey v. Crim*, 9 Biss. 95; *Haven v. Kramer*, 41 Iowa, 382; *Blight v. Schenck*, 10 Penna. St. 285.

It is the general, if not universal, rule of the courts, to protect the

innocent purchaser of property for value, against such vices in the title of their vendors, as result from fraud practised by them in acquiring the property. For in all such cases the party complaining is found to have been guilty of some negligence in his dealings, or to have trusted some agent who has disappointed his confidence and is more to blame for the consequences than the innocent purchaser, so that his equity is inferior to that of such purchaser. Hence, it is, that the innocent purchaser for value from a fraudulent grantee, is always protected in his title as against the equity of the wronged grantor. In *Hoffman v. Strohecker*, 7 Wats. 86, where a sale has been made under execution upon a satisfied judgment, the satisfaction not appearing of record, an innocent purchaser of the person who purchased at the sale was protected in his title, although the purchaser at the sale had knowledge of the facts, and acquired no title. A similar holding had been made by the same court in *Price v. Jenkins*, 4 Wats. 85, and in *Pettermann v. Murphy*, Id. 424. In the case of *Price v. Jenkins* it is said "An innocent purchaser of the legal title, without notice of trust or fraud is peculiarly protected in equity, and chancery never lends its aid to enforce a claim for the land against him."

Most of the cases cited and relied on by the defendant are not in point. Where the grantee wrongfully procures the holder of a deed as an *escrow* to deliver it to him, he acquires no title, or at least a voidable one; but this is a very different case from where a third person without notice, afterward and while the grantee is in possession, deals with him in good faith as owner. Again, it may be conceded that the delivery of a deed by one who simply holds it as a depository, transfers no title; but if he holds it as an *escrow*, with power to deliver it on certain conditions, a delivery, though wrongful, is not in excess of his authority for, in such case, the act is within his authority and binds the principal as against an innocent party. And so a deed held in *escrow*, delivered after the death of the principal, passes no title. It will readily appear, from reasons already given, that such cases are without application to the case under review. Here it will be conceded that as between the grantor and the grantee the latter took no title, because delivered by Howard contrary to his instruction. But the plaintiff relies on the fact that, as found, he had no knowledge that the deed had ever been held as an *escrow* and, in good faith, loaned his money and took a mortgage on the land to secure it; and that the defendant is therefore estopped from setting up his legal title as against him.

But it is claimed that, as the plaintiff relies on an estoppel, he should have pleaded it. This rule, however, only applies where the party has had an opportunity to do so. In this case he had none until the evidence had been introduced. The defendant, in his answer and cross-petition, set up that the deed from him had been placed in *escrow* and wrongfully delivered to the grantee and that the plaintiff had knowledge of the facts. The plaintiff then averred his want of any knowledge or

belief as to the facts stated by the defendant and denied them. The court, however, found that the deed had been delivered to Howard Colvin to be held as an *escrow* and was by him wrongfully delivered to the grantee; but also found that the plaintiff was ignorant of the facts, and an innocent purchaser for value without notice. The object of pleading is to inform the opposite party of the facts upon which the pleader relies as the ground of his claim or defence. And here, when the plaintiff denied knowledge of the facts as pleaded by the defendant, he fairly advised the defendant that he relied on an estoppel, on the ground of want of notice, should the facts as pleaded be made to appear in the evidence; for, that he was a purchaser for value appeared from his petition, which was taken as true as it was not controverted. Hence the claim of the plaintiff could in no way surprise the defendant unless he was ignorant of the law. The first opportunity the plaintiff had to plead an estoppel as against James E. Colvin, was when the facts were fully made to appear in evidence; and he is not therefore precluded from doing so on the facts as found by the court.

*Judgment reversed and judgment on the facts for plaintiff in error.*¹

KITTOE v. WILLEY.

SUPREME COURT OF WISCONSIN. 1904.

[Reported 121 Wis. 548.]

APPEAL from a judgment of the circuit court for Grant county: E. RAY STEVENS, Judge. *Affirmed.*

Action of ejectment by plaintiff, one of ten heirs of John Willey, deceased, against the other nine heirs as defendants, but especially against William H. Willey, who claims to own eighty acres of land by virtue of a warranty deed executed by the ancestor, John Willey, in his lifetime. Similar deeds of other parcels of land were made to three other brothers at the same time. The only question was whether such deeds were delivered so as to become effective. As a result of some conflict in evidence, the trial court found that these deeds were executed by John Willey and his wife, witnessed, and acknowledged, about January 4, 1896, whereupon, in the presence of the scrivener and the witnesses, John Willey said to his wife: "Now mother, you keep them [the deeds] in your possession as long as you live, and then give them or deliver them to the boys." The whole transaction was without the knowledge or co-operation of the grantees named. John Willey died January 22d, whereupon Mrs. Willey informed the sons of the deeds, and in the presence of some of them deposited them with the cashier of a bank, with directions to deliver them to the named grantees upon her death. Shortly after her death, which

¹ See *Mays v. Shields*, 117 Ga. 814 (1908).

occurred June 28, 1896, that cashier handed the deeds to the respective grantees. Upon the delivery to him of the deed, the defendant William H. Willey entered upon, and ever since has occupied and claimed title to, the eighty acres in dispute.

From these specific facts and some others the court found that the grantor, John Willey, parted with all control and dominion over the deeds at the time he delivered them to his wife. Judgment dismissing the complaint was entered, from which the plaintiff appeals.

Geo. B. Clementson for appellant.

Olin & Butler for appellee.

DODGE, J. The finding of the court as to the words used by the deceased, John Willey, at the time the deed was placed in his wife's hands, must be sustained. It is supported by the testimony of the only living witness to the transaction, and is contradicted only by the fact that the same witness, on another occasion, in purporting to quote those words, omitted part of them. The only other question involved is whether from those words, in the light of the attending circumstances, we can say that the further finding that John Willey then intended to place the deed beyond his control, and therefore deliver it for the grantee, must be set aside as against the great preponderance of the evidence.

The rules of law generally governing the delivery of a deed to another than the grantee are quite well settled by our own decisions. *Prutsmen v. Baker*, 30 Wis. 644; *Campbell v. Thomas*, 42 Wis. 437; *Albright v. Albright*, 70 Wis. 528, 36 N. W. 254; *Williams v. Daubner*, 103 Wis. 521, 79 N. W. 748; *Ward v. Russell*, *ante*, p. 77, 98 N. W. 939. These cases establish that the manual deposit of a deed with a third person, to receive and hold for the grantee, with intent thereby to give such paper effect as a deed and to place the same beyond the custody and control of the grantor, will give such deed validity and efficacy as against the grantor, although some condition is imposed, precedent to final delivery to the grantee, which may serve to prevent vesting of actual title in him meanwhile, certainly if such precedent event is one sure to happen. There must be physical tradition of the deed out of the grantor's possession, and there must be the intent to place it out of his control for the benefit of the grantee. Obviously the latter element is the one over which difficulty most frequently arises, and not much can be said *a priori* to guide the judgment of trial courts thereon. Hardly more has been accomplished in that direction than to prescribe the rule that any express reservation of a right to withdraw the deed from the depositary refutes the intent essential to its efficacy. Obviously all the circumstances — closeness of relation to the depositary, naturalness of such selection as mere custodian for the grantor, ease of latter's physical access to papers as usually kept by the person selected as depositary, certainty or uncertainty of grantor's belief in his approaching death; all these, besides the spoken words — may vary the conclusion in different cases.

Undoubtedly the wife of a bedridden man is so natural a person to receive into her hands a paper which he desires to retain in his legal custody that the intent to make an effective delivery is less readily to be inferred from the handing of a deed to her than if to a stranger. *Morris v. Caudle*, 178 Ill. 9, 52 N. E. 1086. Nevertheless, if the necessary intent exists, a deposit with her is as effective as with another. *Squires v. Summers*, 85 Ind. 252; *Stout v. Rayl*, 146 Ind. 379, 45 N. E. 515; *Sneathen v. Sneathen*, 104 Mo. 201, 209, 16 S. W. 497; *Miller v. Meers*, 155 Ill. 284, 40 N. E. 577. The question of that intent was, as we have said, one of fact, to be answered by inference from all the circumstances surrounding the transaction. While the inference might well be doubtful, we are convinced that the doubt is very evenly balanced between the conclusion reached by the trial court and a contrary one; nay, we are by no means certain that we should not reach the same result. In such situation we cannot set aside the finding of fact as to John Willey's intent, which, standing, supports the judgment rendered.

By the Court. — Judgment affirmed.

BAKER v. HALL.

SUPREME COURT OF ILLINOIS. 1905.

[Reported 214 Ill. 364.]

APPEAL from the Circuit Court of Champaign county; the Hon. SOLON PHILBRICK, Judge, presiding.

It appears from the pleadings, proofs and master's report found in the record in this case, that for some years prior to the 16th day of May, 1885, Martha Ann Hall was the owner in fee simple of one hundred and seventy-eight acres of agricultural lands located in Champaign county, Illinois, upon which she, her husband, Lyman Hall, and their daughter Martha Zurretta Hall, resided as their home; that on that day Martha Ann Hall, and her husband, Lyman Hall, executed and acknowledged a deed conveying the said premises to Martha Zurretta Hall in consideration of one dollar to them in hand paid, "also in consideration of faithful services rendered" by Martha Zurretta Hall in caring for her parents, and the grantors reserved the right "to hold full possession until the deaths of each of the grantors, when the grantee is to have full possession in her own right." At the time of the execution of said deed Martha Ann Hall was sick and confined to her bed. After the deed was signed and acknowledged it was handed by the notary to Lyman Hall in the presence of Martha Ann Hall. Martha Ann Hall died December 30, 1885, and Lyman Hall filed said deed for record May 3, 1886, in the recorder's office of Champaign county, where it was recorded, and in 1891 deposited it with Lyman Hall, Jr., a grandson, with instructions to hold the same for him, in whose possession it

remained until the commencement of this suit. There is no proof in the record when Martha Zurretta Hall first knew of the existence of the said deed. After the death of Martha Ann Hall, Lyman Hall and Martha Zurretta Hall continued to reside on said premises for a number of years, when they moved to the city of Champaign, where they lived at the time of the death of Lyman Hall, which occurred in the month of February, 1892.

On December 31, 1891, Martha Zurretta Hall executed a trust deed conveying the said premises to Charles R. Baker, as trustee, which she delivered to Baker after the death of Lyman Hall, and Baker has been in possession of the said premises, as trustee, since the delivery to him of said deed, which trust deed provided said trustee should take possession of and rent the land, keep up improvements, and pay the balance of the income, less his compensation, to Martha Zurretta Hall during her life, and upon her death to convey the premises to Lydia Z. Baker, Emily Z. Hall and Nellie L. Bowers, in equal proportions. The witnesses speak of Martha Zurretta Hall, from the time she was sixteen years of age, as peculiar and not mentally strong, and on August 2, 1892, she was adjudged incapable of caring for her property, and B. D. Harbison was appointed conservator of her estate. He afterwards resigned, and Isaac Fielding, one of the appellees, was appointed his successor. Martha Ann Hall left her surviving Lyman Hall, her husband, and Martha Zurretta Hall, Lydia Z. Baker and Emily Z. Hall, her daughters, and Nellie I. Bowers, the child of a deceased daughter, as her sole and only heirs-at-law.

After the appointment of Isaac Fielding as conservator, a controversy arose between him and the trustee as to the execution of said trust, and the trustee filed a bill in equity to construe said trust deed, fix his compensation, the amount he should expend in improvements, and for the approval of his accounts. The conservator filed a cross-bill attacking the validity of the trust deed on the ground of want of mental capacity in Martha Zurretta Hall to execute the same, and a cross-bill was filed by Lydia Z. Baker to set aside and cancel the deed from Martha Ann Hall and Lyman Hall to Martha Zurretta Hall, as a cloud upon her title, upon the ground that said deed had never been delivered to Martha Zurretta Hall, and for the partition of said premises between herself, Martha Zurretta Hall, Emily Z. Hall and Nellie I. Bowers, as heirs-at-law of Martha Ann Hall, deceased. The issues were made up and the cause was referred to the master to take proofs and report his conclusions. The master found the deed from Martha Ann Hall and Lyman Hall to Martha Zurretta Hall had never been delivered to Martha Zurretta Hall, and that the title to said premises was in Martha Ann Hall at the time of her death, and descended in equal portions to Martha Zurretta Hall, Lydia Z. Baker, Emily Z. Hall and Nellie I. Bowers, as her heirs-at-law, subject to the rights therein of Lyman Hall, husband of Martha Ann Hall, which rights had become extinguished by reason of his death, and recommended that the

premises be partitioned between said heirs. Exceptions were filed to the master's report and sustained by the court, and the cross-bill of Lydia Z. Baker was dismissed for want of equity, and Lydia Z. Baker, Emily Z. Hall and Nellie I. Bowers have brought the record to this court for further review by appeal.

Manford Savage, Thomas J. Smith, and C. R. Jungerich, for appellants.

A. D. Mulliken, for appellees.

Mr. JUSTICE HAND delivered the opinion of the court:

The only question involved upon this appeal is whether the deed executed on May 16, 1885, by Martha Ann Hall and husband to Martha Zurretta Hall, was in the lifetime of Martha Ann Hall delivered to the grantee so as to vest the title to the premises described therein in said grantee.

It is clear from the evidence in this record that said conveyance was intended by the grantors as a voluntary settlement of said premises upon their daughter Martha Zurretta Hall. In case of a voluntary settlement it is well settled by the adjudicated cases that the law presumes much more in favor of the delivery of the deed whereby the settlement is created than it does in ordinary cases of deeds of bargain and sale. Especially is this true in case the grantee is an infant or of unsound mind. This difference arises on account of the degree of confidence which the parties, in case of voluntary settlements, are presumed to repose in each other, and the inability of the grantee, in many cases, to take care of and protect his own interests. In an early case (*Bryan v. Wash*, 2 Gilm. 557), Judge CATON thus announced the law governing the presumptions which obtain as to the delivery of a deed in case of voluntary settlement. He said (p. 568): "It must be remembered that the law presumes much more in favor of the delivery of deeds in case of voluntary settlements, especially when made to infants, than it does in ordinary cases of bargain and sale. The same degree of formality is never required, on account of the great degree of confidence which the parties are presumed to have in each other, and the inability of the grantee, frequently, to take care of his own interests. The presumption of law is in favor of the delivery, and the burden of proof is on the grantor to show clearly that there was no delivery. It was so adjudged by Chancellor Kent in the case of *Souverbye v. Arden*, 1 Johns. Ch. 256, where he says: 'A voluntary settlement, fairly made, is always binding, in equity, upon the grantor, unless there be a clear and decisive proof that he never parted or intended to part with the possession of the deed; and even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances, besides the mere fact of his retaining it, to show that it was not intended to be absolute.'" This case has been followed and the principles therein announced approved by this court in the following cases: *Masterson v. Cheek*, 23 Ill. 72; *Rivard v. Walker*, 39 id. 413; *Reed v. Douthitt*, 62 id. 348; *Union Mutual Life Ins. Co. v. Campbell*, 95 id.

267; *Cline v. Jones*, 111 id. 568; *Weber v. Christen*, 121 id. 91; *Douglas v. West*, 140 id. 455; *Winterbottom v. Pattison*, 152 id. 334; *Miller v. Meers*, 155 id. 284; *Valter v. Blawka*, 195 id. 610; *Chapin v. Nott*, 203 id. 341, and is the settled law of this State.

In *Masterson v. Cheek*, *supra*, on page 74, it was said: "As a general principle, both delivery and acceptance are essential to the validity of all deeds conveying land; but the principle is to be understood with some qualification, as in the case of infants or lunatics, either of whom may be grantees but neither of whom can signify an acceptance."

And in *Miller v. Meers*, *supra*, on page 295: "It is well settled that the law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements, especially in favor of infants, than in ordinary cases of bargain and sale. The acceptance by the infant will be presumed. And it is even held that an instrument may be good as a voluntary settlement though it be retained by the grantor in his possession until his death, provided the attending circumstances do not denote an intention contrary to that appearing upon the face of the deed."

And in *Rodemeier v. Brown*, 169 Ill. 847, on page 859: "The law makes stronger presumptions in favor of the delivery of deeds in cases of voluntary settlements than in ordinary cases of bargain and sale. . . . In cases of voluntary settlements, the mere fact that the grantor retains the deed in his possession is not conclusive against its validity, if there are no other circumstances, besides the mere fact of his retaining it, to show that it was not intended to be absolute."

And in *Chapin v. Nott*, *supra*, on page 347: "The law has a regard for the relationship of the parties and the motives that are presumed to dictate such conveyances, and the degree of confidence which the parties, standing in such relation, as donors and donees of valuable property, are presumed to have; and in such case the presumption of law is that there was a delivery, and when brought in question the burden is upon the grantor, or those claiming adversely to the donee or beneficiary, to show clearly that there was no delivery."

The acceptance of the provisions of a voluntary settlement, if beneficial to the grantee, will be presumed, even though he had no knowledge of the existence of the deed until after the death of the grantor. In *Rivard v. Walker*, *supra*, it was said (p. 414): "A merely formal delivery of a deed is not required, even as between adults. It is only necessary that the grantor should part with the control of the deed, and do so with a view of passing the title of the land. He may deliver the deed to the grantee or to a stranger for his use, and his acceptance will be presumed from the fact that the deed is for his benefit. This is the law in behalf of adults, and a much larger presumption is indulged in regard to infants, from their incapacity to manifest directly their acceptance of a deed." And in *Winterbottom v. Pattison*, *supra* (p. 340): "The grantee's acceptance will sometimes be presumed from the fact that the deed is for his benefit. (*Rivard v. Walker*, 39 Ill. 413; 5 Am.

& Eng. Ency. of Law, p. 448.) Where the grantee is an infant, the presumption of acceptance is a rule of law, and 'knowledge of the conveyance and of its acceptance is not necessary.' And in *Chilvers v. Race*, 196 Ill. 71, on page 77: "Where the conveyance is a voluntary settlement, or to one who is not *sui juris*, a formal assent need not be shown, as it will, if nothing further appear, be presumed."

It is also held that no particular form or ceremony is necessary to constitute a delivery of a deed. It may be "by acts without words, or by words without acts, or by both." Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed shall presently become operative and effectual and that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a sufficient delivery. The very essence of the delivery is the intention of the parties. *Cline v. Jones*, *supra*.

The deed in question was executed by Martha Ann Hall, her husband, Lyman Hall, joining in the execution thereof. After it was signed and acknowledged, the notary public, in the presence of Martha Ann Hall, delivered it to Lyman Hall. Afterwards he caused the deed to be recorded. After a diligent search of the record we have been unable to discover any fact or circumstance which tends in any degree to rebut the presumption arising upon the face of the deed that Martha Ann Hall intended, by its execution and delivery to her husband, to convey the title to the said premises to her daughter at the time she signed and acknowledged and delivered to him said deed. This case differs in this particular from the many cases cited and relied upon by the appellants, as it will be found in those cases facts appeared in the record which rebutted the presumption that the grantor intended that the deed should presently become operative and effectual, and that he lost control over it, and that by it the grantee became vested with the estate.

We think it apparent the provision found in the deed reserving the possession of the premises, "until the deaths of each of the grantors," affords strong presumptive proof that Martha Ann Hall intended the title to immediately vest in Martha Zurretta Hall. Had she not intended the title to immediately vest, there was no reason for reserving in the deed the possession of the premises during the life of herself and her husband. If the effect of that reservation was to create a life estate in Lyman Hall, then, under the authority of *Chapin v. Nott*, *supra*, the delivery to him was a delivery of the deed to Martha Zurretta Hall, as it was there held that the delivery of a deed to a life tenant is a sufficient delivery to the remainder-man, where both estates are created by the same deed.

It is, however, urged, that Lyman Hall took no interest in said lands by virtue of said reservation. If this contention be conceded, then Lyman Hall stood in the position of a stranger to said deed, and Martha Ann Hall might legally deliver said deed to him for the benefit

of their child, Martha Zurretta Hall, which delivery would have been natural and proper, as it appears Martha Zurretta Hall was not fully capable of accepting the deed in person and of protecting her interests in the land transferred to her by the deed.

The deed in this case which the court is asked to hold void on the ground that it was not delivered, was executed in the year 1885. It was placed upon record within a few months after its execution, and Lyman Hall occupied the premises, by virtue of its terms, for about six years. Subsequent to his death Martha Zurretta Hall, through a trustee, occupied the premises, by virtue of said deed, for about ten years. The other heirs of Martha Ann Hall during all that time did not question said deed as a valid conveyance, and recognized Martha Zurretta Hall, the grantee therein named, as the owner of the premises in fee, subject to the right of her father to occupy it during his life. No claim of fraud is made or proved. The authorities in this State are clear that the burden of proof is upon the appellants to establish the non-delivery of said deed. (*Bryan v. Wash, supra*; *Rivard v. Walker, supra*; *Chapin v. Nott, supra*.) In the last case it was held, when the delivery of a deed creating a voluntary settlement is "brought in question the burden is upon the grantor, or those claiming adversely to the donee or beneficiary, to show clearly that there was no delivery."

We are of the opinion the chancellor properly held that the delivery of the deed to Martha Zurretta Hall was not impeached, and that he did not err in dismissing the cross-bill of Lydia Z. Baker.

The decree of the circuit court will be affirmed.

Decree affirmed.

THE CANCELLATION OF DEEDS. The cancellation of a deed does not destroy the estate created by it. *Ward v. Lumley*, 5 H. & N. 87 (1800); *Campbell v. Jones*, 52 Ark. 498 (1899). But where a grantee has voluntarily destroyed or surrendered his deed, he will not ordinarily be allowed to give parol evidence of its contents. See *Farrar v. Farrar*, 4 N. H. 191 (1837). Cf. *Bank of Newbury v. Eastman*, 44 N. H. 431 (1862).

As to the effect of the Registry Acts on the cancellation of deeds, see *Commonwealth v. Dudley*, 10 Mass. 403 (1818); *Holbrook v. Tirrell*, 9 Pick. 104 (Mass. 1829); *Lawrence v. Stratton*, 6 Cush. 168 (Mass. 1850).

CHAPTER X.

DEDICATION.¹

THE KING v. LEAKE.

KING'S BENCH. 1833.

[Reported 5 B. & Ad. 469.]

INDICTMENT² against the inhabitants of Leake for the non-repair of a road. At the trial before *Tindal*, C. J., at the Lincoln Summer Assizes, 1831, a verdict of guilty was entered, subject to the opinion of the court on a case stated: The Commissioners under the Statute of 41 Geo. III., c. 135, for draining certain lands, made a drain about six miles long, and also made a bank on the east side of the drain, with the earth taken from it, in the manner directed by the Statute, and of the average breadth of forty feet. The bank has been used by all persons for about twenty-five years as a public highway for horses, carts, and carriages, without intermission, and is a very convenient and useful road for the public. About two miles of the road, commencing at Bennington Bridge and extending northwards, are in the parish of Leake. The part indicted is that portion of these two miles which lies between Simon's House Bridge and Lade Bank. It is out of repair, as charged in the indictment.

The parish of Leake has always repaired the part of the said road on the east bank from Bennington Bridge to Simon's House Bridge, and from Lade Bank northward as far as the parish of Leake extends; and it was proved that about ten years ago that parish repaired the part of the road now indicted.

If the court should be of opinion that the parish of Leake was liable to repair the part of the road indicted, then the verdict of guilty was to stand; if not, then a verdict of not guilty to be entered.

Whitehurst, for the Crown.

Waddington, contra.

Cur. adv. vult.

PARKE, J. The questions raised on the argument of this case were three:—

1st, Whether it was competent for the persons in whom the soil was vested, to dedicate the use of part of it, to the public, as a highway; it

¹ See *Lade v. Shepherd*, 2 Stra. 1004 (1785); 3 Gray, Cas. on Prop. (2d. ed.) 507.

² This statement is abbreviated from that in the report, and parts only of the case and of the opinions are given.

not being disputed but that if they had the power, such dedication had taken place.

2dly, Whether it is necessary in order to charge the parish, that it should have adopted the highway; and if it was,

3dly, Whether the parish had in fact adopted it.

I have never entertained the least doubt upon any of these questions, except the first; upon that I have felt some difficulty; but after much consideration, my opinion is, upon the statements in this case, that the commissioners in whom the property was vested might dedicate part of it to this special use.

[The discussion of this question is omitted.]

Upon the other two questions, I never had any doubt. As to the second, I have always considered it as clear that the parish is at common law bound to repair all *public* highways; this being by the common law, the mode by which each parish contributes its share towards the public burden of repairing all highways, instead of all the public roads being prepared by one general tax. Hence, if a road *be dedicated* to the public, no parish can refuse to repair it. It must bear in that shape its share of the general burden, and its inhabitants receive an equivalent, not in the use of that road in particular, but in the use of all the public roads in the realm. The absence of repair by the parish is indeed a strong circumstance, in point of evidence, to prove that the road is not a public one, — the fact of repair has a contrary effect; but the conduct of the parish in acquiescing or refusing its acquiescence is, in my opinion, immaterial in every other point of view.

The judgment of Mr. Baron Bayley in the case of *Rex v. St. Benedict*, 4 B. & A. 450, was cited on the argument as an authority to the contrary; but with every respect for that very learned judge, I must say I cannot accede to the doctrine there laid down, and I am not aware that there is any authority in support of it.

Upon the third question, also, I feel no doubt. The repair by the parish of the part in question is undoubtedly a sufficient adoption, if adoption be necessary, which I am clearly of opinion it is not.

Upon the whole, therefore, I am of opinion that the Crown is entitled to our judgment.

LITLEDAL, J. A great number of cases have been cited as to what shall be taken to be a dedication of land to the public, so as to establish a highway. I need not advert to these, because I agree in their authority; and I think if this land was not in the peculiar circumstances in which it is placed, there would be a sufficient dedication to make it a public highway.

[The learned judge, however, was of opinion that the commissioners had no power to dedicate to the use of the public as a highway, and therefore he dissented from the judgment of the court.]

DENMAN, C. J. The question raised by this case was, whether the parish of Leake is bound to repair a road which runs along the top of a bank forty feet wide; in other words, whether this, which is unques-

tionably a road *de facto*, is also a road *de jure*. The bank was made in execution of certain works of drainage done under an Act of the second of G. 8, and another Act of the forty-first of G. 8; and it is stated as a fact that "the said bank has been used by all persons for about twenty-five years as a public carriage road without intermission, and is a very useful and convenient road to the public." It is further stated, that part of the indicted portion of the road was repaired by the parish of Leake ten years ago.

[The Chief Justice held that the commissioners had power to dedicate. This part of the opinion is omitted.]

A second point was, that the parish was not stated to have adopted the road, but only to have repaired it on one occasion. If the fact of adoption were necessary, this statement of evidence from which it might be inferred would be insufficient. But I by no means think any distinct act of adoption necessary in order to make a parish liable to repair a public road: I am of opinion that if it is public, the parish is of common right bound to repair it.

*Judgment for the Crown.*¹

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BEATTY v. KURTZ.

SUPREME COURT OF THE UNITED STATES. 1829.

[Reported 2 Pet. 566.]

MR. JUSTICE STORY delivered the opinion of the court.²

This is an appeal in a suit in equity from a decree of the Circuit Court of the District of Columbia, sitting for the County of Washington.

Georgetown was erected into a town by an Act of the Legislature of Maryland, passed in 1751, ch. 25. By subsequent Acts additions were made to the territorial limits of the town; and the town was created a corporation, with the usual municipal officers, by an Act of the Maryland Legislature, passed in 1789, ch. 23. The charter of incorporation has been subsequently amended by Congress, by various Acts passed upon the subject since the cession.

In the year 1769, Charles Beatty and George F. Hawkins laid out a town, known by the name of Beatty and Hawkins's addition to Georgetown, and which is now included within its corporate limits. The lots of this addition were disposed of by way of lottery, under the direction of commissioners appointed to lay out the same, and conduct the drawing of the lottery. The books of the lottery and the plan of the lots, and a connected survey thereof, were afterwards, by Act

¹ On qualified dedication, see *Mercer v. Woodgate*, L. R. 5 Q. B. 26 (1860); *Arnold v. Baker*, L. R. 6 Q. B. 433 (1871); *Tallon v. Hoboken*, 60 N. J. L. 212, 217 (1897).

² The opinion only is given.

passed in 1796, ch. 54, ordered to be recorded in the clerk's office for the Territory of Columbia, and copies thereof to be good evidence in all courts of law and equity in the State. Upon the original plan so recorded, one lot was marked out and inscribed with these words, "for the Lutheran Church;" and this lot was in fact part of the land of which Charles Beatty was seized.

The bill was brought up by the original plaintiffs, alleging themselves to be trustees and agents for the German Lutheran Church, composed of the members of the German Lutheran Church of Georgetown, duly organized as such, *in behalf of themselves and the members of the said church*. It charges the laying out of the lot in question for the sole use and benefit of the Lutheran Church, to be held by them for religious purposes, and the use of the congregation, as above mentioned. That soon afterwards the lot was taken possession of by the said German Lutherans in Georgetown; who organized themselves into a church or congregation, and erected a church or house of worship thereon; and the lot was enclosed by them and a church erected thereon; and hath been kept and held by them during a period of fifty years; and hath been used as a burying-ground for the members of the church, with the avowed intention of building thereon another church or place of worship, the first building erected thereon being decayed, whenever their funds would enable them so to do. That during all this period their possession has never been questioned, and the lot has been exempted from taxation as property set apart for a religious purpose. It further charges that upon the organization of the church or congregation, certain officers, called a committee and trustees, were appointed to take care of the said church, which appointments have been from time to time renewed; that in 1824 the plaintiffs were reappointed as such, having been so appointed at former times. It further charges that Charles Beatty died about sixteen years ago, without having made any conveyance of the said lot, and that Charles A. Beatty, the defendant, is his heir, and has the title by descent; and prays that he may be compelled to convey it to them. It further charges that Ritchie, the other defendant, has unwarrantably disputed their title; and has entered upon the lot and removed some of the tombstones erected thereon, and means to dispossess the plaintiffs and to remove the tombstones and graves. The bill therefore prays that they may be quieted in their possession, and that a writ of injunction may issue, and for further relief.

The defendants put in a joint answer. They admitted that the lot was so marked in the plot as the bill states, and that it was Charles Beatty's intention to appropriate the same to the use of the Lutheran congregation, provided they would build thereon, within a reasonable time, a house of public worship. They deny that the German Lutherans were ever organized, as stated in the bill; or that any such church has been built; or that there has been any such possession or enclosure as

the bill asserts; or that Charles Beatty ever made any conveyance of the property to transfer his title. They admit that the lot has been used as a graveyard, but not exclusively appropriated to the use of the Lutheran congregation. They admit that a building was erected thereon, but that it was used as a schoolhouse. They admit that the defendant Beatty is heir-at-law, and as such, that he claims the lot in question, and has authorized the defendant Ritchie to take possession thereof. They deny all the equity in the bill, as well as the authority of the plaintiffs to sue; declaring them to be mere volunteers, and demanding proof of their authority, &c.

The general replication was filed, and the cause came on for a hearing upon the bill, answer, exhibits and depositions; and the court decreed a perpetual injunction against the defendants, with costs. The appeal is brought from that decree.

Upon examining the evidence, it appears to us that the material allegations of the bill are satisfactorily established. It is proved that, shortly after the appropriation, and more than fifty years ago, the Lutherans of Georgetown proceeded to erect a log house on the lot, which was used as a church for public worship, by that denomination of Christians; and was also occasionally, and at different times since, used as a schoolhouse under their direction. That at a much later period, a steeple and bell were added to the building; that the land was used as a churchyard; that a sexton appointed by Lutherans had the direction of it; that more than half of the lot is covered with graves; and others as well as Lutherans have been buried there; that the Lutherans have caused the lot to be enclosed from time to time, as the fences fell into decay, and procured subscriptions for that purpose; that the possession of the Lutherans, in the manner in which it was exercised over the lot, by erecting a house, by public worship, by enclosing the ground, and by burials, was never questioned by Charles Beatty in his lifetime, or in any manner disturbed until a short period before the commencement of the present suit. That Charles Beatty in his lifetime constantly avowed that the lot was appropriated for the Lutherans, and that they were entitled to it.

The Lutherans have constituted but a small number in the town of Georgetown; they have not been able, therefore, to maintain public worship constantly in the house so erected, during the whole period; and sometimes it has been intermitted for a considerable length of time. But efforts have been constantly made, as far as practicable, to keep together a congregation, to use the means of divine worship, and to support public preaching. The house, however, in consequence of inevitable decay, fell down some time ago; the exact period of which, however, does not appear; but it seems to have been more than forty years after its first erection. Efforts have since been made to rebuild it, but hitherto they have not been successful.

The Lutherans in Georgetown, who have possessed the lot in question, are not and never have been incorporated as a religious society.

The congregation has consisted of a voluntary society, acting in its general arrangement by committees and trustees, chosen from time to time by the Lutherans belonging to it. There do not appear to have been any formal records kept of their proceedings; and there have been periods of considerable intermission in their appointment and action. There is no other proof that the plaintiffs are a committee of the congregation, than what arises from the statement of witnesses, that they were so chosen by a meeting of Lutherans, and that their appointment has always been acquiesced in by the Lutherans, and they have assumed to act for them without any question of their authority; that they are themselves Lutherans, living in Georgetown, and forming a part of the voluntary society, is not disputed.

There is decisive evidence also that the defendant Beatty has, since the decease of his father, repeatedly admitted the claim of the Lutherans to the lot, and his willingness that it should remain for them, as it had been originally appropriated. No assertion of ownership was ever made by him, until the acts were committed, which form the gravamen of the present bill.

Such are the material facts; and the principal questions arising upon this posture of the case, are, first, whether the title to the lot in question ever passed from Charles Beatty, so far at least as to amount to a perpetual appropriation of it to the use of the Lutheran Church, or to the pious uses to which it has been in fact appropriated. And secondly, if so, whether it is competent for the plaintiffs to maintain the present bill.

As to the first question, it is not disputed that Charles Beatty did originally intend that this lot should be appropriated for the use of a Lutheran church in the town laid off by him. But as there was not at that time any church, either corporate or unincorporated, of that denomination in that town, there was no grantee capable of taking the same, immediately by grant. Nor can any presumption of a grant arise from the subsequent lapse of time, since there never has been any such incorporated Lutheran Church there capable of taking the donation. If, therefore, it were necessary that there should be a grantee legally capable of taking, in order to support the donation in this case, it would be utterly void at law, and the land might be resumed at pleasure. To be sure, if an unincorporated society of Lutherans had, upon the faith of such donation, built a church thereon, with the consent of Beatty, that might furnish a strong ground why a court of equity should compel him to convey the same to trustees in perpetuity for their use; or at least to execute a declaration of trust, that he and his heirs should hold the same for their use. For such conduct would amount to a contract with the persons so building the church, that he would perfect the donation in their favor; and a refusal to do it would be a fraud upon them which a court of equity ought to redress. And if the town of Georgetown had been capable of holding such a lot for such uses, there would be no difficulty in considering the town as the

grantee under such circumstances ; since the uses would be of a public and pious nature, beneficial to the inhabitants generally. But it does not appear that Georgetown, in 1769, or indeed until its incorporation in 1789, was a corporation, so as to be capable of holding lands as an incident to its corporate powers.

If the appropriation, therefore, is to be deemed valid at all, it must be upon other principles than those which ordinarily apply between grantor and grantee. And we think it may be supported as a dedication of the lot to public and pious uses. The Bill of Rights of Maryland gives validity to "any sale, gift, lease or devise of any quantity of land, not exceeding two acres, for a church, meeting, or other house of worship, and for a burying-ground, which shall be improved, enjoyed, or used only for such purpose." To this extent, at least, it recognizes the doctrines of the Statute of Elizabeth for Charitable Uses, under which it is well known, that such leases would be upheld, although there were no specific grantee or trustee. In the case of *The Town of Pawlet v. Clarke*, 9 Cranch, 292, 331, this court considered cases of an appropriation or dedication of property to particular or religious uses, as an exception to the general rule requiring a particular grantee ; and like the dedication of a highway to the public. (See also *Brown v. Porter*, 10 Mass. Rep. 93 ; *Weston v. Hunt*, 2 Mass. Rep. 500 ; *Inhabitants of Shapleigh v. Gilman*, 18 Mass. Rep. 190 ; *Burrard's Case*, 12 Jac. C. B. ; 2 Mod. Ent. 413 b.) There is no pretence to say, that the present appropriation was ever attempted to be withdrawn by Charles Beatty during his lifetime, and he did not die until about sixteen years ago. On the contrary, the original plan and appropriation were constantly kept in view by all the legislative Acts passed on the subject of this addition. The plan was required to be recorded as an evidence of title, and its incorporation into the limits of Georgetown had reference to it. We think then it might at all times have been enforced as a charitable and pious use, through the intervention of the government as *parens patriæ*, by its attorney-general or other law officer. It was originally consecrated for a religious purpose ; it has become a depository of the dead ; and it cannot now be resumed by the heirs of Charles Beatty.

The next question is as to the competency of the plaintiffs to maintain the present suit. If they were proved to be the regularly appointed committee of a voluntary society of Lutherans, in actual possession of the premises, and acting by their direction to prevent a disturbance of that possession, under circumstances like those stated in the bill, we do not perceive any serious objection to their right to maintain the suit. It is a case, where no action at law, even if one could be brought by the voluntary society (which it would be difficult to maintain), would afford an adequate and complete remedy. This is not the case of a mere private trespass ; but a public nuisance, going to the irreparable injury of the Georgetown congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement, is to be

taken from them; the sepulchres of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased are to be wounded; and the memorials erected by piety or love, to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living.

The only difficulty is whether the plaintiffs have shown in themselves a sufficient authority, since it is not evidenced by any formal vote or writing. If it were necessary, to decide the case on this point, we should incline to think that under all the circumstances it might be fairly presumed. But it is not necessary to decide the case on this point; because, we think it one of those cases, in which certain persons, belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society; for purposes common to all, and beneficial to all. Thus, some of the parishioners may sue a parson to establish a general *modus*, without joining all; and some of the members of a voluntary society or company, when the parties are very numerous, may sue for an account against others, without joining all. (Cooper's Eq. Plead. 40, 41; Mitf. Plead. 145.)

And upon the whole we are of opinion, that the decree of the Circuit Court ought to be affirmed, with costs.¹

The cause was argued for the appellants, by *Mr. C. C. Lee*; and for the appellees, by *Messrs. Key and Dunlop*.

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CINCINNATI v. WHITE.

SUPREME COURT OF THE UNITED STATES. 1832.

[Reported 6 Pet. 431.]

THIS was a writ of error to the Circuit Court of the District of Ohio.

The case came before the court on a bill of exceptions, taken by the

¹ If a layman, by the dissolution of monasteries, hath a monastery in which there is a church, part of it, and he suffers the parishioners for a long time to come there to hear divine service, and to use it as a parish church; that shall give a jurisdiction to the ordinary to order the seats; because that now, in fact, it becomes the parish church, which before was not subject to the ordinary: adjudged 12 Ja. C. B.; *Buzzard's Case*, 3 Mod. E. 413, 6. — REP.

See *McLain v. School Directors*, 51 Pa. 196 (1865); *Mowry v. Providence*, 10 R. I. 52 (1871). Cf. *Colbert & Kirtley v. Shepherd*, 89 Va. 401 (1892).

plaintiffs in error, the defendants in the Circuit Court, to the instructions given by the court to the jury on the request of the counsel for the plaintiffs in that court; and to the refusal of the court to give certain instructions as prayed for by the defendants below.

In the opinion of the court no decision is given on those exceptions, save only on that which presented the question of the dedication of the land in controversy for the use of the city of Cincinnati; which, and the facts of the case connected therewith, are fully stated in the opinion of the court. The arguments of the counsel in the case, on the matters of law presented by the exceptions, are therefore necessarily omitted.

The case was argued by *Mr. Storer* and *Mr. Webster*, for the plaintiffs in error; and by *Mr. Ewing* and *Mr. Clay*, for the defendants.

MR. JUSTICE THOMPSON delivered the opinion of the court.

The ejectment in this case was brought by Edward White, who is also the defendant in error, to recover possession of a small lot of ground in the city of Cincinnati, lying in that part of the city usually denominated the Common. To a right understanding of the question upon which the opinion of the court rests, it will be sufficient to state generally, that on the 15th of October in the year 1788, John Cleves Symmes entered into a contract with the then board of treasury, under the direction of Congress, for the purchase of a large tract of land, then a wilderness, including that where the city of Cincinnati now stands. Some negotiations relative to the payments for the land delayed the consummation of the contract for several years. But on the 30th of September, 1794, a patent was issued conveying to Symmes and his associates, the land contracted for; and as Symmes was the only person named in the patent, the fee was of course vested in him.

Before the issuing of the patent, however, and, as the witnesses say, in the year 1788, Mathias Denman purchased of Symmes a part of the tract included in the patent, and embracing the land whereon Cincinnati now stands. That in the same year, Denman sold one third of his purchase to Israel Ludlow, and one third to Robert Patterson. These three persons, Denman, Ludlow and Patterson, being the equitable owners of the land (no legal title having been granted), proceeded in January 1789 to lay out the town. A plan was made and approved of by all the proprietors; and according to which the ground lying between Front Street and the river, and so located as to include the premises in question, was set apart as a common, for the use and benefit of the town forever, reserving only the right of a ferry; and no lots were laid out on the land thus dedicated as a common.

The lessor of the plaintiff made title to the premises in question under Mathias Denman, and produced in evidence a copy, duly authenticated, of the location of the fraction 17 from the books of John C. Symmes to Mathias Denman, as follows: "1791, April 4, Captain Israel Ludlow, in behalf of Mr. Mathias Denman of New Jersey, presents for entry and location a warrant for one fraction of a section, or one hundred and seven acres and eight tenths of an acre of land, by virtue of which

he locates the seventeenth fractional section in the fourth fractional township, east of the Great Miami river, in the first fractional range of townships on the Ohio river; number of the warrant 192." In March 1795, Denman conveyed his interest, which was only an equitable interest, in the lands so located to Joel Williams; and on the 14th of February 1800 John Cleves Symmes conveyed to Joel Williams in fee, certain lands described in the deed which included the premises in question; and on the 16th of April 1800, Joel Williams conveyed to John Daily the lot now in question. And the lessor of the plaintiff, by sundry mesne conveyances, deduces a title to the premises to himself.

In the course of the trial several exceptions were taken to the ruling of the court, with respect to the evidence offered on the part of the plaintiff in making out his claim of title. But in the view which the court has taken of what may be considered the substantial merits of the case, it becomes unnecessary to notice those exceptions.

The merits of the case will properly arise upon one of the instructions given by the court, as asked by the plaintiff; and in refusing to give one of the instructions asked on the part of the defendant. At the request of the plaintiff, the court instructed the jury, "that to enable the city to hold this ground and defend themselves in this action by possession, they must show an unequivocal, uninterrupted possession for at least twenty years."

On the part of the defendants, the court was asked to instruct the jury, "that it was competent for the original proprietors of the town of Cincinnati to reserve and dedicate any part of said town to public uses, without granting the same by writing or deed to any particular person; by which reservation and dedication the whole estate of the said proprietors in said land, thus reserved and dedicated, became the property of, and was vested in the public, for the purposes intended by the said proprietors; and that, by such dedication and reservation, the said original proprietors, and all persons claiming under them, are estopped from asserting any claim or right to the said land thus reserved and dedicated." The court refused to give the instruction as asked, but gave the following instruction:

"That it was competent for the original proprietors of the town of Cincinnati to reserve and dedicate any part of said town to public uses, without granting the same by writing or deed to any particular person; by which reservation and dedication the right of use to such part, is vested in the public for the purposes designated; but that such reservation and dedication do not invest the public with the fee."

The ruling of the court to be collected from these instructions was, that although there might be a parol reservation and dedication to the public of the use of lands; yet such reservation and dedication did not invest the public with the fee; and that a possession and enjoyment of the use for less than twenty years, was not a defence in this action.

The decision and direction of the Circuit Court upon those points, come up on a writ of error to this court.

It is proper in the first place to observe, that although the land which is in dispute, and a part of which is the lot now in question, has been spoken of by the witnesses as having been set apart by the proprietors as a common, we are not to understand the term as used by them in its strict legal sense; as being a right or profit which one man may have in the lands of another; but in its popular sense, as a piece of ground left open for common and public use, for the convenience and accommodation of the inhabitants of the town.

Dedications of land for public purposes have frequently come under the consideration of this court; and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title; applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor. But that is not the light in which this court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor; and secure to the public the benefit held out, and expected to be derived from, and enjoyed by the dedication.

It was admitted at the bar, that dedications of land for charitable and religious purposes, and for public highways, were valid, without any grantee to whom the fee could be conveyed. Although such are the cases which most frequently occur and are to be found in the books, it is not perceived how any well-grounded distinction can be made between such cases and the present. The same necessity exists in the one case as in the other, for the purpose of effecting the object intended. The principle, if well founded in the law, must have a general application to all appropriations and dedications for public use, where there is no grantee *in esse* to take the fee. But this forms an exception to the rule applicable to private grants, and grows out of the necessity of the case. In this class of cases there may be instances, contrary to the general rule, where the fee may remain in abeyance until there is a grantee capable of taking; where the object and purpose of the appropriation look to a future grantee in whom the fee is to vest. But the validity of the dedication does not depend on this; it will preclude the party making the appropriation from reasserting any right over the land; at all events so long as it remains in public use: although there may never arise any grantee capable of taking the fee.

The recent case of *Beatty v. Kurtz*, 2 Peters, 566, in this court, is somewhat analogous to the present. There a lot of ground had been marked out upon the original plan of an addition to Georgetown, "*for the Lutheran Church*," and had been used as a place of burial from the time of the dedication. There was not, however, at the time of the appropriation, or at any time afterwards, any incorporated Lutheran church capable of taking the donation.

The case turned upon the question, whether the title to the lot ever passed from Charles Beatty, so far as to amount to a perpetual appropriation of it to the use of the Lutheran church. That was a parol

dedication only, and designated on the plan of the town. The principal objection relied upon was, that there was no grantee capable of taking the grant. But the court sustained the donation, on the ground that it was a dedication of the lot to public and pious uses; adopting the principle that had been laid down in the case of the *Town of Pawlet v. Clark*, 9 Cranch, 292, that appropriations of this description were exceptions to the general rule requiring a grantee. That it was like a dedication of a highway to the public. This last remark shows that the case did not turn upon the Bill of Rights of Maryland, or the Statute of Elizabeth relating to charitable uses, but rested upon more general principles; as is evident from what fell from the court in the case of the *Town of Pawlet v. Clark*, which was a dedication to religious uses; yet the court said this was not a novel doctrine in the common law. In the familiar case where a man lays out a street or public highway over his land, there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication to public uses. And in support of the principle, the case of *Lade v. Shepherd*, 2 Stra. 1004, was referred to; which was an action of trespass, and the place where the supposed trespass was committed, was formerly the property of the plaintiff, who had laid out a street upon it, which had continued thereafter to be used as a public highway; and it was insisted on the part of the defendant, that by the plaintiff's making a street, it was a dedication of it to the public, and that although he, the defendant, might be liable for a nuisance, the plaintiff could not sue him for a trespass. But the court said, it is certainly a dedication to the public, so far as the public has occasion for it, which is only for a right of passage; but it never was understood to be a transfer of his absolute property in the soil.

The doctrine necessarily growing out of that case, has a strong bearing upon the one now before the court, in two points of view. It shows, in the first place, that no deed or writing was necessary to constitute a valid dedication of the easement. All that was done, from anything that appears in the case, was barely laying out the street by the owner, across his land. And in the second place, that it is not necessary that the fee of the land should pass, in order to secure the easement to the public. And this must necessarily be so from the nature of the case, in the dedication of all public highways. There is no grantee to take immediately, nor is any one contemplated by the party to take the fee at any future day. No grant or conveyance can be necessary to pass the fee out of the owner of the land, and let it remain in abeyance until a grantee shall come *in esse*; and indeed the case referred to in *Strange* considers the fee as remaining in the original owner; otherwise he could sustain no action for a private injury to the soil, he having transferred to the public the actual possession.

If this is the doctrine of the law applicable to highways, it must apply with equal force, and in all its parts, to all dedications of land to public uses; and it was so applied by this court to the reservation of a

public spring of water for public use, in the case of *M'Connell v. The Trustees of the Town of Lexington*, 12 Wheat. 582. The court said; the reasonableness of reserving a public spring for public use, the concurrent opinion of all the settlers that it was so reserved, the universal admission of all that it was never understood that the spring lot was drawn by any person, and the early appropriation of it to public purposes; were decisive against the claim.

The right of the public to the use of the common in Cincinnati, must rest on the same principles as the right to the use of the streets; and no one will contend, that the original owners, after having laid out streets, and sold building lots thereon, and improvements made, could claim the easement thus dedicated to the public.

All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country; but the principle, so far as respects the right of the original owner to disturb the use, must rest on the same ground in both cases; and applies equally to the dedication of the common as to the streets. It was for the public use, and the convenience and accommodation of the inhabitants of Cincinnati; and doubtless greatly enhanced the value of the private property adjoining this common, and thereby compensated the owners for the land thus thrown out as public grounds.

And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted.

The right of the public in such cases does not depend upon a twenty years' possession. Such a doctrine, applied to public highways and the streets of the numerous villages and cities that are so rapidly springing up in every part of our country, would be destructive of public convenience and private right.

The case of *Jarvis v. Dean*, 3 Bingham, 447, shows that rights of this description do not rest upon length of possession. The plaintiff's right to recover in that case, turned upon the question whether a certain street in the parish of Islington had been dedicated to the public as a common public highway. Chief-Justice Best, upon the trial, told the jury that if they thought the street had been used for years as a public thoroughfare, with the assent of the owner of the soil, they might presume a dedication; and the jury found a verdict for the plaintiff, and the court refused to grant a new trial, but sanctioned the direction given to the jury and the verdict found thereupon; although this street had been used as a public road only four or five years; the court saying, the jury were warranted in presuming it was used with the full

assent of the owner of the soil. The point therefore upon which the establishment of the public street rested, was whether it had been used by the public as such, *with the assent* of the owner of the soil; not whether such use had been for a length of time, which would give the right by force of the possession; nor whether a grant might be presumed; but whether it had been used with the assent of the owner of the land; necessarily implying, that the mere naked fee of the land remained in the owner of the soil, but that it became a public street, by his permission to have it used as such. Such use, however, ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.

In the present case, the fact of dedication to public use, is not left to inference, from the circumstance that the land has been enjoyed as a common for many years. But the actual appropriation for that purpose is established by the most positive and conclusive evidence. And indeed the testimony is such as would have warranted the jury in presuming a grant, if that had been necessary. And the fee might be considered in abeyance, until a competent grantee appeared to receive it; which was as early as the year 1802, when the city was incorporated. And the common having then been taken under the charge and direction of the trustees, would be amply sufficient, to show an acceptance, if that was necessary, for securing the protection of the public right.

But it has been argued, that this appropriation was a nullity, because the proprietors, Denman, Ludlow and Patterson, when they laid out the town of Cincinnati, and appropriated this ground as a common, in the year 1789, had no title to the land, as the patent to Symmes was not issued until the year 1794. It is undoubtedly true that no legal title had passed from the United States to Symmes. But the proprietors had purchased of Symmes all his equitable right to their part of the tract which he had under his contract with the government. This objection is more specious than solid, and does not draw after it the conclusions alleged at the bar.

There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. This was the doctrine in the case of *Jarvis and Dean*, already referred to, with respect to a street; and the same rule must apply to all public dedications; and from the mere use of the land, as public land, thus appropriated, the assent of the owner may be presumed. In the present case, there having been an actual dedication fully proved, a continued assent will be presumed, until a dissent is shown; and this should be satisfactorily established by the party claiming against the dedication. In the case of *Rezv. Lloyd*, 1 Camp. 262, Lord Ellenborough says, if the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to

preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public.

At the time the plan of the town of Cincinnati was laid out by the proprietors, and the common dedicated to public use, no legal title had been granted. But as soon as Symmes became vested with the legal title, under the patent of 1794, the equitable right of the proprietors attached upon the legal estate, and Symmes became their trustee, having no interest in the land but the mere naked fee. And the assent of the proprietors to the dedication continuing, it has the same effect and operation as if it had originally been made after the patent issued. It may be considered a subsequent ratification and affirmance of the first appropriation. And it is very satisfactorily proved, that Joel Williams, from whom the lessor of the plaintiff deduces his title, well understood, when he purchased of Denman, and for some years before, that this ground had been dedicated as a public common by the proprietors. The original plat, exhibiting this ground as a common, was delivered to him at the time of the purchase. And when he afterwards, in the year 1800, took a deed from Symmes, he must, according to the evidence in the case, have known, that he was a mere trustee, holding only the naked fee. And from the notoriety of the fact, that these grounds were laid open and used as a common; it is fairly to be presumed, that all subsequent purchasers had full knowledge of the fact.

But it is contended that the lessor of the plaintiff has shown the legal title to the premises in question in himself, which is enough to entitle him to recover at law; and that the defendants' remedy, if any they have, is in a court of equity. And such was substantially the opinion of the Circuit Court, in the fourth instruction asked by the plaintiff, and given by the court, viz. "that if the said proprietors did appropriate said ground, having no title thereto, and afterwards acquired an equitable title only, that equitable title could not inure so as to vest a legal title in the city or citizens, and enable them to defend themselves in an action of ejectment brought against them by a person holding the legal title."

We do not accede to this doctrine. For should it be admitted, that the mere naked fee was in the lessor of the plaintiff, it by no means follows that he is entitled to recover possession of the common in an action of ejectment.

This is a possessory action, and the plaintiff, to entitle himself to recover, must have *the right of possession*; and whatever takes away this right of possession, will deprive him of the remedy by ejectment. Adams's Eject. 32. Starkie, part 4, 506, 507.

This is the rule laid down by Lord Mansfield in *Atkins v. Horde*, 1 Burr. 119. An ejectment, says he, is a possessory remedy, and only competent where the lessor of the plaintiff may enter; and every plaintiff in ejectment must show a right of possession as well as of property. And in the case of *Doe v. Staple*, 2 Durn. and East, 684, it was held,

that although an outstanding satisfied term may be presumed to be surrendered, yet an unsatisfied term, raised for the purpose of securing an annuity, cannot, during the life of the annuitant; and may be set up as a bar to the heir at law, even though he claim only subject to the charge. Thereby clearly showing the plaintiff must have, not only the legal title, but a clear present right to the possession of the premises; or he cannot recover in an action of ejectment. And in the case of *Doe v. Jackson*, 2 Dowl. and Ryl. 523, Bayley, Justice, says, "an action of ejectment, which from first to last is a fictitious remedy, is founded on the principle, that the tenant in possession is a wrong-doer; and unless he is so at the time the action is brought, the plaintiff cannot recover."

If then it is indispensable that the lessor of the plaintiff should show a right of possession in himself, and that the defendants are wrong-doers; it is difficult to perceive on what grounds this action can be sustained.

The later authorities in England which have been referred to, leave it at least questionable, whether the doctrine of Lord Mansfield in the case of *Goodtitle v. Alker*, 1 Burr. 143, "that ejectment will lie by the owner of the soil for land, which is subject to a passage over it as the king's highway;" would be sustained at the present day at Westminster Hall. It was not even at that day considered a settled point, for the counsel on the argument (page 140) referred to a case, said to have been decided by Lord Hardwicke; in which he held that no possession could be delivered of the soil of a highway, and therefore no ejectment would lie for it.

This doctrine of Lord Mansfield has crept into most of our elementary treatises on the action of ejectment, and has apparently, in some instances, been incidentally sanctioned by judges. But we are not aware of its having been adopted in any other case where it was the direct point in judgment. No such case was referred to on the argument, and none has fallen under our notice. There are, however, several cases in the Supreme Court of Errors of Connecticut, where the contrary doctrine has been asserted and sustained by reasons much more satisfactory than those upon which the case in Burrow is made to rest. *Stiles v. Curtis*, 4 Day, 328; *Peck v. Smith*, 1 Con. Rep. 103.

But if we look at the action of ejectment on principle, and inquire what is its object, it cannot be sustained on any rational ground. It is to recover possession of the land in question; and the judgment, if carried into execution, must be followed by delivery of possession to the lessor of the plaintiff.

The purpose for which the action is brought, is not to try the mere abstract right to the soil, but to obtain actual possession; the very thing to which the plaintiff can have no exclusive or private right. This would be utterly inconsistent with the admitted public right. That right consists in the uninterrupted enjoyment of the possession. The two rights are therefore incompatible with each other, and cannot stand together. The lessor of the plaintiff seeks specific relief, and to be

put into the actual possession of the land. The very fruit of his action, therefore, if he avails himself of it, will subject him to an indictment for a nuisance; the private right of possession being in direct hostility with the easement, or use to which the public are entitled; and as to the plaintiff's taking possession subject to the easement, it is utterly impracticable. It is well said, by Mr. Justice Smith in the case of *Stiles v. Curtis*, that the execution of a judgment in such case, involves as great an inconsistency as to issue an *habere facias possessionem* of certain premises to A., subject to the possession of B. It is said, cases may exist where this action ought to be sustained for the public benefit, as where erections are placed on the highway, obstructing the public use. But what benefit would result from this to the public? It would not remove the nuisance. The effect of a recovery would only be to substitute another offender against the public right, but would not abate the nuisance. That must be done by another proceeding.

It is said in the case in *Burrow*, that an ejectment could be maintained because trespass would lie. But this certainly does not follow. The object and effect of the recoveries are entirely different. The one is to obtain possession of the land, which is inconsistent with the enjoyment of the public right; and the other is to recover damages merely, and not to interfere with the possession, which is in perfect harmony with the public right. So, also, if the fee is supposed to remain in the original owner, cases may arise where perhaps waste or a special action on the case may be sustained for a private injury to such owner. But these are actions perfectly consistent with the public right. But a recovery in an action of ejectment, if carried into execution, is directly repugnant to the public right.

Upon the whole, the opinion of the court is, that the judgment must be reversed, and the cause sent back, with directions to issue a *venire de novo*.¹

¹ The Supreme Court of New York, in *Pearson v. Post*, 20 Wend. 111 (1838), refused to extend the doctrine of dedication to a public landing-place, and the judgment was affirmed in the Court of Errors, s. c. 22 Wend. 426 (1839); though one member at least of the court thought the decision should be placed on another ground. This last case was approved by GREEN, C. J. in *O'Neill v. Annett*, 3 Dutch. 290 (N. J. 1859). See also *California, etc. Co. v. Union, etc. Co.*, 126 Cal. 433 (1899). But decisions to the contrary have been made in *Godfrey v. Alton*, 12 Ill. 29 (1850); *Mankato v. Willard*, 18 Minn. 13 (1868); and *Whyte v. St. Louis*, 158 Mo. 80 (1899).

The doctrine has been extended to land for public schools. *Klinkener v. M'Keesport*, 11 Pa. 444 (1849); *Carpenteria School District v. Heath*, 56 Cal. 478 (1890).

Not, however, to land to be used for railroad purposes. *Todd v. Pittsburg, etc., R. R. Co.*, 19 Ohio St. 514 (1869); *L. E. & W. R. R. Co. v. Whitam*, 155 Ill. 514, 529 (1895).

It was held in *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407 (N. Y. 1844), and *Pierce v. Spafford*, 53 Vt. 394 (1881), that land could be dedicated for a burying-ground. (In the former case the dedication was for a burying-ground for the inhabitants of the town.)

REED v. NORTHFIELD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1832.

[Reported 13 Pick. 94.]¹

THIS was an action on the case, upon Stat. 1786, c. 81, to recover double damages for an injury to the plaintiff, caused by a defect in a highway in the town of Northfield.

The defect complained of was a hole in the road, by the side of a small bridge. The plaintiff alleged that the horse on which he was riding, stepped into the hole, and fell, and threw the plaintiff over his head.

At the trial, before *Morton, J.*, it was agreed that the road had been known and used as a public highway, for fifty years before the injury to the plaintiff, and as such, during that time, had been repaired by the town of Northfield. The defendants objected to the sufficiency of these facts to show such a highway as would render the defendants liable in this action; but the judge overruled the objection, and instructed the jury that they were sufficient.

The jury returned a verdict for the plaintiff, and the defendants excepted.

Dewey, R. E. Newcomb, and H. G. Newcomb, for the defendants.

Wells, for the plaintiff.

SHAW, C. J., afterward drew up the opinion of the court. On the trial of this action against the town of Northfield, for injury sustained by the plaintiff, by the insufficiency of a highway, several objections were taken by the defendants to the directions of the judge in matters of law, which have now been considered.

It was among other things objected, that the *locus in quo* was not sufficiently proved to be a highway, by the facts shown. These facts were, that it had been known and used as a public highway for fifty years, and during that time had been repaired by the town. It is analogous to a right of way, or other easement; which, it has been recently decided, may be held by prescription, by proving a use for forty years. *Kent v. Waite*, 10 Pick. 138; *Melvin v. Whiting*, Ibid. 295. Whether a public right of way can be established by dedication and tacit adoption, by a presumed grant, or by any other mode, in a period short of forty years, we do not now give any opinion.

But if an uninterrupted use of a highway and the support of it by the town for forty years, which is now the longest term of prescription known to the law, would not establish it, it would be equivalent to declaring that there can be no highway proved in any mode but by the record of its being laid out; which, in regard to many, and those the most important and ancient highways of the commonwealth, would be utterly impossible. But without dwelling upon the supposed inconvenience of a different rule, we think it clear upon principle, that

¹ Part only of the case is given.

public easements, as well as others, may be shown by long and uninterrupted use and enjoyment, upon the conclusive legal presumption from such enjoyment, that they were, at some anterior period, laid out and established by competent authority.¹

STATE v. WILSON.

SUPREME JUDICIAL COURT OF MAINE. 1856.

[Reported 42 Me. 9.]

TENNEY, C. J.² Was there dedication by the defendant's grantor of the shore on which the wharf was erected, as a highway?

For a long time serious doubts were entertained by distinguished judges in other States, whether, under the general statutory provisions for laying out and establishing roads and highways, such as have existed in this State, a public highway could be constituted by dedication. But it may now be regarded as a question no longer open, but it is the settled doctrine, that in this mode, ways may be proved to have a legal existence. And it is not necessary that the dedication be made specially, to a corporate body, capable of taking by grant; it may be to the general public, and limited only by the wants of the

¹ "No doubt, in the early settlement of the country, when lands were commonly granted to a company of proprietors, public ways were reserved, when the lands were surveyed and allotted, which have remained open and public ways to the present time, of which there is no record. That these are, in all respects, highways, is a point too well established to require authorities. To establish such a way, where there is no proof of dedication, and where the element of dedication does not subsist, it will be necessary to prove actual public use, general, uninterrupted, continued for a certain length of time. In general, it must be such as to warrant a presumption of laying out, dedication or appropriation, by parties having authority so to lay out, or a right so to appropriate, like that of prescription or non-appearing grant in case of individuals. It stands upon the same legal grounds, a presumption that whatever was necessary to give the act legal effect and operation was rightly done, though no other evidence of it can now be produced except the actual enjoyment of the benefits conferred by it. By the Rev. Stats. c. 25, § 26, the actual repair of such a road by the town or person liable for its defects is made conclusive evidence of its location.

"The only point which would seem to admit of any question is the length of time through which such actual use and enjoyment must have existed, to establish such way by prescription. The policy of the law has been for some years past to shorten such time. In *Williams v. Cummington*, 18 Pick. 312, it was held that such a use for thirty-eight years was sufficient. This was held, not because the term of thirty-eight years is fixed by any Statute, rule of law, or usage, but it happened to be the time in that case, and the case was not governed by Stat. 1786, c. 67, § 7, prescribing a term of forty years in certain cases. On the contrary, it is put upon the ordinary ground of prescription and presumption of a non-appearing grant or record, which we now consider as fixed at twenty years." — *Per SHAW, C. J.*, in *Jennings v. Tisbury*, 5 Gray, 73 (Mass. 1855).

See also *Durgin v. Lowell*, 3 All. 398 (Mass. 1862); *Commonwealth v. Coupe*, 128 Mass. 63 (1880).

² The statement of facts is omitted and a part only of the opinion is printed.

community. If accepted and used by the public, in the manner intended, it works an estoppel *in pais*, precluding the owner, and all claiming in his right, from asserting an ownership inconsistent with such use. The right of the public does not rest upon a grant by deed, nor upon a twenty years' possession; but upon *the use of the land*, with the *assent of the owner*, for such a length of time, that the public accommodation and private rights might be materially affected by an interruption of the enjoyment. *Pawlett v. Clark*, 9 Cranch, 292; *New Orleans v. United States*, 10 Peters, 662; *Cincinnati v. White*, 6 Peters, 431; *Jarvis v. Dean*, 3 Bing. 447.

To constitute a way by dedication, two things are essential to be proved; the *act of dedication* and the *acceptance* of it on the part of the public. *Marq. Stafford v. Coyney*, 7 B. & C. 257; 2 Greenl. Ev. § 662. Whether it has been dedicated or not by the owner of the land, and accepted by the public, is a question of intention, and therefore may be proved or disproved by the acts of the owner, and the circumstances under which the use has been permitted. But it does not follow, that because there is a dedication of a public way by the owner of the soil, and the public use it, the town or other public corporation is bound to keep it in repair. To bind a corporation to this extent, it seems to be required that there should be some proof of acquiescence or adoption by the corporation itself.¹

OGLE v. CUMBERLAND.

COURT OF APPEALS OF MARYLAND. 1899.

[Reported 90 Md. 59.]

APPEAL from the Circuit Court for Washington County (SLOAN, J.).

The cause was argued before McSHERRY, C. J., FOWLER, BRISCOE, PAGE, BOYD, PEARCE, SCHMUCKER, and BOND, JJ.

R. T. Semmes (with whom was *W. H. Kealhofer* on the brief), for the appellant.

James A. McHenry and *De Warren H. Reynolds* (with whom was *Buchanan Schley* on the brief), for the appellee.

SCHMUCKER, J., delivered the opinion of the Court.

This case was instituted by the appellant to recover damages from the city of Cumberland for personal injuries sustained by him from falling into a ditch or sewer at the point where it crossed a road, which he contends was a public street of that city.

The facts of the case are substantially as follows: Prior to the year 1887 persons and vehicles having occasion to pass in either direction between Creek Street, in the city of Cumberland, and the basin of the

¹ See *Harrison County v. Seal*, 66 Miss. 129 (1888).

Chesapeake and Ohio Canal were in the habit of crossing in a nearly direct line over the land of the canal company, lying between the basin and the corner of Creek and Canal Streets. Early in 1887 the West Virginia Railroad Company acquired this land from the canal company by condemnation and erected trestles and other structures upon it which prevented its use as a roadway and thus made it necessary to provide a new way of access to the canal basin from the corner of Creek and Canal Streets.

In the condemnation proceedings, by which the railroad company acquired this land, it was agreed in the presence of the jury and set forth in the return of the inquisition that another road, twenty-four feet wide, extending over the condemned land from Creek Street, near its intersection with Canal Street to the basin should be "kept open for the use of the canal and the public for passing for all purposes for which a public road is commonly used to and between Creek Street, and the canal." This new road crossed the railroad track by passing under the trestle, which supported the track, and just before passing under the trestle the road crossed the ditch or sewer into which the appellant fell when he was injured.

The appellant kept a saloon in a house near the basin, which he rented from the canal company. He was injured by falling into the ditch after dark on the evening of February 1st, 1894, as he was going from Creek Street along the new road toward his saloon. He sued the city of Cumberland for damages, alleging that this new road was a public street, which it was the duty of the city to keep in repair, but that it had negligently been permitted to be in a dangerous condition, &c., &c.

There never was any grant to the city of the new road as a street, nor was there ever any formal acceptance by the city of its dedication to public use, but the appellant relies upon the facts about to be mentioned as amounting to an implied acceptance by the city. In January, 1891, the City Council, in response to a petition addressed to it by the appellant, ordered a light to be placed "at or near the railroad crossing under the trestling of the West Virginia Railroad leading to the tow-path," and appointed a committee to execute the order. This committee finding a light already located within fifty feet of the place where the road crossed under the trestle, advised that this lamp be moved into such a position as would throw its light upon the crossing under the trestle, and the council ordered it to be done, but it had not in fact been done when the accident to the appellant occurred. The ditch into which he fell had for many years carried the surface water from Creek and other streets down to the canal basin, and on one or more occasions, prior to the accident, the employees of the city had been seen to clean out the ditch and scrape the surface of the streets which it drained.

In November, 1886, the City Council passed an ordinance accepting an offer of the railroad company to locate its freight depot so as to occupy a portion of the east side of the bed of Canal Street, at and

near its intersection with Creek Street, upon condition that the railroad company would give to the city sufficient land on the west side of the street to maintain its original width.

The Court below being of the opinion that none of the transactions appearing in evidence were legally sufficient to show an acceptance by the city of Cumberland of the twenty-four foot road on which the accident occurred as a public street granted the prayer of the defendant taking the case from the jury, and the plaintiff appealed.

There can be no question that the facts of this case establish a dedication to public use by the railroad company of the road upon which the appellant was injured. As between the owner of the land covered by the road and the public, the latter were entitled to use it as a highway, but that did not of itself impose upon the city the obligation to keep the road in repair nor make it liable for accidents occurring from the defective condition of the road. Before the appellee can be held liable for the injury for which the present suit was instituted, it must appear that there had been an acceptance by it through the acts of its authorized public departments or officials of the road on which the accident happened, as one of its public streets. *Kennedy v. Mayor, &c., of Cumberland*, 65 Md. 520; *State, use of James v. Kent Co.*, 83 Md. 377; *Valentine v. City of Hagerstown*, 86 Md. 486; 2 Dillon on Municipal Corporations, sec. 642.

These authorities hold that the acceptance of a street by a municipality "may be either express and appear of record or they may be implied from repairs knowingly made or paid for by the authority which has the legal power to adopt the street or highway, or from long use by the public." They also hold that when public use is relied on to establish the acceptance, there must have been an uninterrupted use by the public for at least twenty years, and such use for a less time will be insufficient.

It is not contended in the present case that there has been an express municipal acceptance of the alleged street or a public use of it for more than twenty years, nor is there in our opinion proof of any acts or transactions on the part of the city or its authorized officials in reference to it affording proper evidence of an implied acceptance. Certainly the occasional cleansing of the ditch and the scraping of Creek and the other streets which it drains by the employees of the city can have no important bearing upon the subject, for it appears from the evidence that the ditch had been in existence for forty years before the road was opened. Nor is the fact that the City Council were willing to grant the appellant's request to have a light placed near the crossing of the road under the railway trestle important.

The appellant himself, although he offered the facts just alluded to in evidence, did not strongly rely upon them in argument, but he claimed that the leaving open by the railroad company of the new road in its condemnation proceedings and the passage shortly thereafter by the City Council of the ordinance allowing the railroad company to use

a portion of the bed of Canal Street must be taken as parts of a common scheme to accommodate both the railroad company and the city, from which an acceptance by the latter of the new road as one of its streets is to be implied.

An examination of these two proceedings makes it quite plain that this contention of the appellant cannot be maintained. Each of the two proceedings is complete in itself and neither one refers to or is dependent upon the other. The condemnation proceedings took away from the canal company the land over which access had theretofore been had to its wharf and basin from Creek Street, and the new road was simply provided by the railroad company in lieu of the one taken away. The city was not a party to the condemnation proceedings, nor does the former road over the condemned land appear to have ever been accepted by the city as a street. The ordinance in reference to Canal Street fully covers the matter to which it relates and requires the railroad company to give to the city additional land on one side of Canal Street in lieu of the portion on the other side of the street to be occupied by the depot. Further, this ordinance on its face recites that when its terms have been carried out "the width of said street for traffic purposes will be increased 33 per cent."

The record fails to disclose any such acceptance by the appellee as the law requires of the road on which the accident to the appellant occurred, and therefore the Court below properly took the case away from the jury.

The judgment will be affirmed with costs.

Judgment affirmed.

NOTE.—In *Holdane v. Trustees of Cold Spring*, 21 N. Y. 474 (1860) one of the grounds of decision was that until the dedication had been accepted by the public, the owner of the land had a right to revoke it; and the same law was held in *Lee v. Sandy Hill*, 40 N. Y. 442 (1869); but *Trustees of M. E. Church v. Hoboken*, 4 Vroom, 13 (N. J. 1868) is *contra*.

On abandonment of the purpose for which land was dedicated see *Campbell v. Kansas*, 102 Mo. 828 (1890).

See *Starr v. People*, 17 Col. 458, 460 (1892).

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